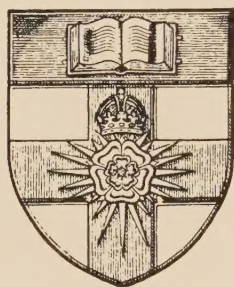


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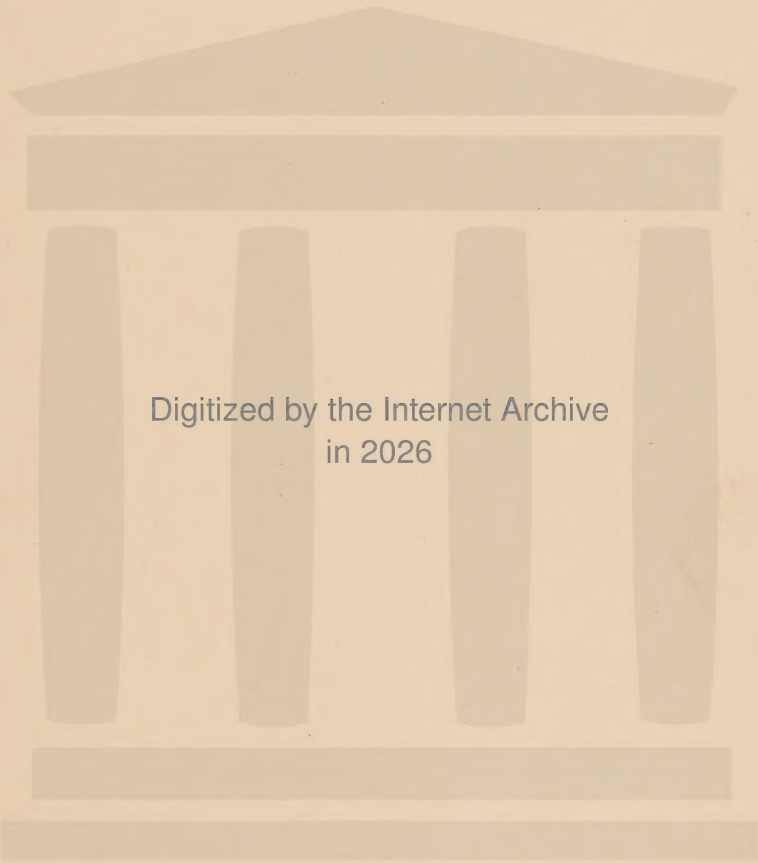
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1913.

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MEMORANDA.

1913.

February 17. THE RIGHT HONOURABLE LORD MACNAGHTEN, *Lord of Appeal in Ordinary*, died at his residence, Queen's Gate, South Kensington, at the age of 83.

March 4. THE HONOURABLE SIR ROBERT JOHN PARKER, *one of the Justices of the Chancery Division*, was appointed a *Lord of Appeal in Ordinary* by the title of LORD PARKER OF WADDINGTON, in the county of York, and was afterwards sworn of the Privy Council. CHARLES HENRY SARGANT, ESQUIRE, *Junior Counsel to the Treasury*, was appointed a Judge of the Chancery Division, and was afterwards knighted.

April 22. THE RIGHT HONOURABLE LORD GORELL, *formerly President of the Probate, Divorce and Admiralty Division*, died at Mentone, in his 65th year.

May 30. JAMES RICHARD ATKIN, ESQUIRE, K.C., was appointed a Justice of the High Court of Justice, and was afterwards knighted.

June 2. THE HONOURABLE SIR CHARLES SWINFEN EADY, *one of the Justices of the High Court of Justice*, was appointed a *Lord Justice of Appeal*, and was afterwards sworn of the Privy Council.

June 3. JOHN MEIR ASTBURY, ESQUIRE, K.C., was appointed a Justice of the High Court of Justice, and was afterwards knighted.

October 14. THE RIGHT HONOURABLE ANDREW GRAHAM, LORD DUNEDIN, K.C.V.O., was appointed a *Lord of Appeal in Ordinary* under "The Appellate Jurisdiction Act, 1913."

October 20. THE RIGHT HONOURABLE SIR JOHN ANDREW HAMILTON, a *Lord Justice of Appeal*, was appointed a *Lord of Appeal in Ordinary* under "The Appellate Jurisdiction Act, 1913," by the title of BARON SUMNER OF IBSTONE, in the county of Buckingham.

October 20. THE RIGHT HONOURABLE SIR RUFUS DANIEL ISAACS, K.C.V.O., K.C., *Attorney-General*, was appointed *Lord Chief Justice of England* in the place of THE RIGHT HONOURABLE LORD ALVERSTONE, G.C.M.G., who resigned his office on account of ill-health.

October 21. THE RIGHT HONOURABLE SIR WALTER GEORGE FRANK PHILLIMORE, BARONET, *one of the Justices of the High Court of Justice*, was appointed a *Lord Justice of Appeal* in the place of THE RIGHT HONOURABLE SIR JOHN ANDREW HAMILTON, appointed a *Lord of Appeal in Ordinary*.

October 21. THE RIGHT HONOURABLE SIR JOHN ALLSEBROOK SIMON, K.C.V.O., K.C., was appointed *Attorney-General*, and STANLEY OWEN BUCKMASTER, ESQUIRE, K.C., was appointed *Solicitor-General*, and was afterwards knighted.

ERRATA.

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136	11 from bottom	<i>C. H. P. Macmillan, K.C.</i>	<i>H. P. Macmillan, K.C.</i>
144	20 and 21	<i>should read Atkin, K.C., Constable, K.C. (of the Scottish Bar), and Norie-Miller, for the respondents.</i>	
288	16 from top	<i>Marten</i>	<i>Masten</i>
391	14, 27, 30	Sheriff's Court	Sheriff Court
394	9 from bottom		
481	5 from bottom	Sir John Mellish	Sir George Mellish
497	7 from top	806	836
498	footnote (2)	[1906] 2 Ch. 403	[1896] 2 Ch. 403
519	9 from bottom	<i>Royce v. Birley</i>	<i>Royse v. Birley</i>
519	footnote (1)	L. R. 4 C. P. 269	L. R. 4 C. P. 296
819	4 from bottom	<i>Moore v. Robinson</i>	<i>Rex v. Justices of Middlesex</i>
819	footnote (1)	2 B. & Ad. 817	2 B. & Ad. 818
849	footnote (1), line 7	require	refuse

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LIST
OF THE
JUDICIAL COMMITTEE
OF
HIS MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,
ESTABLISHED BY THE 3RD & 4TH WILL. IV., c. 41,
FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY
IN COUNCIL.

1913.

Viscount *Haldane*, Lord Chancellor.
 Earl of *Halsbury*.
 Earl *Loreburn*.
 Viscount *Morley of Blackburn*, Lord
 President.
 Marquis of *London-*
derry,
 Marquis of *Crewe*,
 Earl of *Rosebery*,
 Earl *Beauchamp*,
 *Lord *Macnaghten*.
 Lord *Dunedin*.
 Lord *Atkinson*.

} Ex Lords
President.

Lord *Shaw of Dunfermline*.
 Lord *De Villiers*.
 Lord *Mersey*.
 Lord *Moulton*.
 Lord *Parker of Waddington*.
 Lord *Sumner*.
 Sir *Samuel Way*, Bart.
 Sir *Samuel Griffith*, G.C.M.G.
 Sir *Edmund Barton*, G.C.M.G.
 Sir *John Edge*.
 Sir *Charles Fitzpatrick*, G.C.M.G.
 Sir *Joshua Williams*.
 Syed *Ameer Ali*, C.I.E.

And others who being present or past Lords Justices of Appeal are members of the Privy Council (44 Vict. c. 3), or who being members of the Privy Council hold or have held high judicial offices (50 & 51 Vict. c. 70).

* Died February, 1913.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

TAFF VALE RAILWAY COMPANY	APPELLANTS ;	H. L. (E.)
AND		
JENKINS	RESPONDENT.	1912 Oct. 23.

*Fatal Accident—Damage—Evidence—Prospective Loss—Fatal Accidents Act,
1846 (9 & 10 Vict. c. 93), ss. 1 and 2.*

It is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, 1846, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life.

Dicta of Dowse B. in *Bourke v. Cork and Macroom Ry. Co.* (1879) 4 L. R. Ir. 682, and of Lord Morris, when Chief Justice, in *Holleran v. Bagnell* (1880) 6 L. R. Ir. 333, overruled.

Where, therefore, an action was brought by a father under the Fatal Accidents Act, 1846, for damages for the loss of a daughter, aged sixteen, who was killed by the negligence of the defendants, and it was proved that at the date of her death the deceased, who lived with her parents, was nearing the completion of her apprenticeship as a dressmaker and

* *Present*: VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

A. C. 1913.

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was likely in the near future to earn a remuneration which might quickly have become substantial:—

Held, that there was evidence of damage upon which the jury could reasonably act.

APPEAL from a decision of the Court of Appeal.

The respondent, on behalf of himself and his wife, brought an action under the Fatal Accidents Act, 1846, against the appellants for damages for the loss of their daughter, Hannah Jenkins, who was killed in a railway accident on the appellants' railway.

The appellants by their defence admitted that the death was caused by the negligence of their servants, but denied that the respondent or his wife had suffered any damage.

The action was tried before Channell J. and a common jury at Cardiff.

The respondent and his wife lived at Trehafod, in Glamorgan-shire, and the deceased resided with her parents and was maintained by them. The respondent was a fireman in the employment of the Lewis Merthyr Colliery Company; he suffered from varicose veins and was not in robust health. The mother kept a small greengrocer's shop. The deceased, who was sixteen years of age when she met with her death, was a dressmaker's apprentice in the employment of a firm of drapers at Pontypridd, and at the date of her death her apprenticeship had two more months to run. She travelled to Pontypridd and back every day by train, her railway fare being paid by her parents. She was an exceptionally clever girl at her business. If she had remained in the employment of the Pontypridd firm, at the completion of her apprenticeship she would have become a dressmaker's improver and would have earned 3s. or 4s. a week ultimately rising to 2l. a week; but she would have earned more by pursuing her business at her home, as she intended to do. She rendered her mother some assistance in the shop and she occasionally made some small earnings by dressmaking work for some of her neighbours in her spare time.

At the trial the learned judge was asked by counsel for the appellants to withdraw the case from the jury on the ground that there was no evidence of damage, but he refused to do so. The jury awarded 50l. to the respondent and 25l. to

his wife, and the learned judge entered judgment for the respondent accordingly. H. L. (E.)

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The appellants appealed to the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.) and asked for judgment or a new trial on the grounds (1.) that the verdict was against the weight of evidence; (2.) that the damages were excessive; (3.) that there was no evidence in support of the plaintiff's claim proper to be left to the jury, and that the learned judge was wrong in refusing to withdraw the case from the jury and to enter judgment for the defendants.

The Lords Justices differed. Vaughan Williams L.J. was for affirming the judgment and verdict; Farwell L.J. was for entering judgment for the defendants (the appellants) on the ground that there was no evidence of damage; Kennedy L.J. was for ordering a new trial on the ground that the damages were excessive; and in the result the appeal was dismissed.

Francis Williams, K.C., and Owen Beasley, for the appellants. The appellants are entitled to judgment on the ground that there was here no evidence of damage. Damage under the Fatal Accidents Act, 1846, may be proved by shewing that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased, but that expectation must not rest upon mere conjecture or speculation, and, upon the authorities, it is submitted that it must be shewn that the deceased was earning money and contributing to the support of the plaintiff at the time of his death or that he had done so in the past: *Bramall v. Lees* (1); *Franklin v. South Eastern Ry. Co.* (2); *Dalton v. South Eastern Ry. Co.* (3); *Duckworth v. Johnson.* (4) The Irish case of *Condon v. Great Southern and Western Ry. Co.* (5) is opposed to this contention, but that decision is inconsistent with the later Irish authorities, *Bourke v. Cork and Macroom Ry. Co.* (6), *Holleran v. Bagnell* (7), and *Hull v. Great Northern Ry. Co. of Ireland.* (8) The dicta of Dowse B. in *Bourke*

(1) (1857) 29 L. T. (O.S.) 111.

(2) (1858) 3 H. & N. 211.

(3) (1858) 4 C. B. (N.S.) 296.

(4) (1859) 4 H. & N. 653.

(5) (1865) 16 I. C. L. R. 415.

(6) 4 L. R. Ir. 682.

(7) 6 L. R. Ir. 333.

(8) (1890) 26 L. R. Ir. 289.

H. L. (E.) v. *Cork and Macroom Ry. Co.* (1) and of Lord Morris, when Chief Justice, in *Holleran v. Bagnell* (2) to the effect that there must be evidence of pecuniary advantage to the plaintiff in existence prior to or at the time of the death are conclusive in the appellants' favour. Further, a new trial ought to be granted on the ground that the verdict was against the weight of evidence and also on the ground that the damages were excessive.

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Alan Macpherson, for the respondent, was not called upon.

VISCOUNT HALDANE L.C. My Lords, this is an appeal from a judgment of the Court of Appeal refusing a new trial and affirming the judgment given by Channell J. after trial of the action with a common jury at Cardiff.

The appellants are a railway company who are responsible for an accident by which a girl, who was a daughter of the respondent, was killed. There is no question as to the liability of the company for negligence; but the real question is a different one.

The action is brought under Lord Campbell's Act by the father on behalf of himself and the mother for damages for the loss of the daughter. Now we have heard a good deal of authority cited as to what the foundation of such an action is, but I do not think there is much difficulty in coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shewn to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them.

My Lords, that being the state of the law, what were the facts? Hannah Jenkins, the daughter, resided with her parents. They lived in Glamorganshire at a place called Trehafod, and

(1) 4 L. R. Ir. 682.

(2) 6 L. R. Ir. 333.

Hannah Jenkins, the daughter, who was sixteen years of age, H. L. (E.)
 used to go by train every day to Pontypridd, where she was 1912
 in the employment of a firm of drapers and dressmakers, TAFF VALE
 and was learning the business of dressmaking. She was an RAILWAY
 unusually intelligent girl, and though she was still an apprentice v.
 she was shortly coming out of her apprenticeship, and there is JENKINS.
 evidence that she had prospects of beginning before long to earn Viscount
 a remuneration which might quickly have become substantial. Haldane L.C.
 Then there is further evidence that she came to her parents' house at night and that from time to time she gave them some assistance in the house; certainly there is material on which the jury might think that she might have given some assistance in the shop which her mother kept, which was a greengrocer's shop. The father was beginning to fail somewhat in health—he was at all events not so robust as in his younger days, and the jury may reasonably have taken the view that the amount of assistance which she would have given at home to the parents would have been considerable, and also that she might have carried on her own business as a dressmaker and earned some money.

My Lords, I refer to these things not with a view to examining the details of the evidence, because I protest against putting on a Court of law what is the function of a jury. There is a clear line of demarcation between the function of the judge and the function of the jury in cases of this kind. When once you have got it that there was evidence to go to the jury, and that there was a principle on which it could proceed of taking into account any reasonable prospective pecuniary advantage to the parents, then, unless the verdict is so perverse and against the weight of evidence that it cannot stand, it is not for the Court to interfere.

My Lords, in this case the jury had, as it seems to me, sufficient material before it upon which to find a verdict affirming the proposition that there was prospective pecuniary advantage to the parents, of which they were deprived by the daughter's death.

Then, my Lords, when we come to the question of quantum which was discussed so largely by Kennedy L.J., I can only say again that I think it is impossible for a Court to scrutinize minutely the verdict of the jury in arriving at a conclusion. We

H. L. (E.) do not know what the jury took into account, but I can conceive
 1912 many things which it may legitimately have taken into account.
 TAFF VALE It may have thought that the value to these ageing parents of
 RAILWAY the prospective assistance of the daughter amounted in a pecuniary
 v. point of view to 75*l.*; it may have thought that without her
 JENKINS. they would have had to employ a servant or to get in some
 assistance; it may have thought that her earnings would have
 amounted to such a substantial sum that the loss within even a
 comparatively short period would have been such as should be
 measured by 75*l.* I confess myself quite unable to speculate as
 to what was in the mind of the jury when it gave its verdict, nor
 do I see any reason why it might not have come to the conclu-
 sion which it did come to. I can well conceive cases, and there
 are instances of them in the books, in which the verdict given
 ought to be set aside because it was grossly contrary to the
 weight of evidence. But this case does not appear to me to be
 one of them.

For these reasons I am unable to agree with Kennedy L.J. in
 questioning the view which the jury has taken.

As regards the judgment in the Court below, I have already
 indicated that in my view the real question is that which Willes J.
 defines in one of the cases quoted to us, *Dalton v. South Eastern*
Ry. Co.(1): "Aye or No, was there a reasonable expectation of
 pecuniary advantage?" Farwell L.J. makes a somewhat severe
 criticism upon the finding of the jury and he appears to hold it
 established that in every case there has been found as the com-
 mencement and foundation of the action that the child was actually
 earning money or earning money's worth. I think when you
 read his judgment as a whole that seems to have been his view,
 and that he considered that without something of the kind the
 verdict must be guesswork. My Lords, I cannot agree with that
 conclusion on the part of the learned Lord Justice, a judge for
 whose opinion I entertain a deep respect. I think in this case he
 has taken too narrow a view of what the question for the jury ought
 to be and must be. These cases go to a jury because the jury is
 supposed to be cognizant of the conditions and standards of life
 among the persons concerned in a way no judge can be. I am

(1) 4 C. B. (N.S.) 296.

far from saying that there may not be cases of this kind in which the verdict is so perverse that it ought not to stand, but I will only say that I find no sufficient indication that that has been the state of things in the case now under consideration. For these reasons I move your Lordships that the appeal be dismissed with costs.

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LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I concur.

I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact—there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think be drawn from circumstances other than and different from them.

With regard to the amount of compensation, I understand the rough rule applicable to the setting aside of a verdict on the ground of excessive damages to be this, that it should be set aside if the Court cannot find any reasonable proportion between the amount awarded and the loss sustained. I think that in this case it is absolutely impossible to say that there was no reasonable proportion between the sum of 75*l.* and the prospective loss which the parents of this unfortunate girl have sustained.

For these reasons, as well as for those mentioned by my noble and learned friend on the woolsack, I think that the verdict of the jury cannot be disturbed and that the appeal ought to be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the judgments which have been delivered.

The learned counsel for the appellants did not dispute that there would be a title to damages under Lord Campbell's Act to the parents of a child from whose prospective earnings they had a reasonable expectation of profit if such a reasonable

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expectation were destroyed by the child's death caused by the fault of the defendants. But, said the learned counsel, this can only happen if the person—in this case the daughter—so killed was actually earning money or contributing to the support of the plaintiff at the time of her death. My Lords, that condition, so set up as precedent to the recovery of damages, is not in my opinion justified by law.

My Lords, this is a case not at all singular—indeed it is quite typical. A son or daughter may be educated for a business the apprenticeship to which yields money, and the wages in such a business generally are on a humble scale. He or she may on the other hand be educated in a trade or in a profession in which the training or apprenticeship is not one which yields any profit at all, but in which the reward afterwards is much greater, probably in consequence of the exclusion of competition by reason of the period of unpaid probation. In such a case the parents stand the charge during the whole apprenticeship or training of the child, and just as that education is about to close, the life is cut off. My Lords, as I say, the present case is not a singular one, but it is typical of those circumstances in which there is a reasonable expectation of profit, because, my Lords, it is on account of the expectation of profit, and probably of profit on a higher scale, that that mode of education, upbringing, and training of the child has been pursued. I have asked counsel in vain in the course of the case to distinguish an expectation in such a situation in principle from the ordinary expectation in the case of wages being earned at the time, but I have not been able to obtain an answer, and in principle, my Lords, there is no answer. In the one case as in the other the reasonable expectation of profit is destroyed, and whether there was earning at the time or earning only in prospectu, it does not appear to me to affect the question of principle.

But, my Lords, the learned counsel for the appellants very properly, if I may say so, did refer to two authorities from Ireland on this subject (*Bourke v. Cork and Macroom Ry. Co.* (1) and *Holleran v. Bagnell* (2)). In the two cases he referred to dicta were pronounced which were not necessary as *rationes decidendi*, but

(1) 4 L. R. Ir. 682.

(2) 6 L. R. Ir. 333.

which are entitled to much consideration and respect. One was an observation by Dowse B. in which, referring to cases of this kind, he said: "The plaintiff must fail, unless he establishes by evidence that there was in existence, at the time of the death of his son, a state of facts in connexion with him, out of which a pecuniary advantage arose, or had formerly arisen, and was likely to again arise to the father, and the continuance or renewal of which pecuniary advantage the father might have reasonably expected had his son not been killed." My Lords, that postulates the actual receipt of income by the son and the share of the profit of that income by the parent. There is, my Lords, no actual decision of a case in the books to this effect, and the dictum is in my humble opinion erroneous. Such a postulate does not appear to me to be in accordance with the true principle which was laid down in the case of *Franklin v. South Eastern Ry. Co.* (1) by Pollock C.B. when he simply put the broad proposition that the basis of such an action lay in pecuniary loss actual or expected, or, according to another expression used by that very learned judge, in the destruction of a reasonable expectation of pecuniary benefit. I will only say further with regard to *Franklin's Case* (1), that I think it is a strong authority for the course which your Lordships are now pursuing, because, although in that case there was actual benefit,—that is to say, there was an actual earning of income to a small extent on the part of the deceased at the time—the learned Chief Baron went out of his way to make the remark that he would not say, in determining the question of principle, that such actual benefit should be received at the time.

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My Lords, another dictum has been cited—one by the late Lord Morris. His Lordship observed: "The loss must be a pecuniary loss, actual or reasonably to be expected, and not as a solatium;"—had the sentence stopped there we should all, I presume, have agreed with it; but he proceeded—"and there should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death." My Lords, with the utmost respect, I do not think that that is the law.

It goes without saying, however, that in accordance with

(1) 3 H. & N. 211.

H. L. (E.) settled law and practice under Lord Campbell's Act the applica-
 1912 tion of the principle now affirmed does require to be accompanied
 TAFF VALE with this further consideration: that in all these cases, while
 RAILWAY reasonable expectation with regard to future earning is a ground
 v. for consideration, on the other hand the point of solatium and
 JENKINS. any award on that ground must be excluded from the verdict of
 Lord Shaw of the jury.
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As to the point of 75*l.* being excessive damages, I can conceive no reason why the House of Lords should think of disturbing this verdict on such a ground.

LORD MOULTON. My Lords, I concur.

Putting it in plain language, the appellants by their motion for judgment ask this House to find as matter of law that parents in such a position of life as those in this case cannot have any reasonable expectation of pecuniary advantage in the future from the earnings of an exceptionally sharp and competent girl of sixteen, who had practically finished her education as a dress-maker, unless she has actually contributed to the expenses of the family in the past. Such a proposition appears to me only to need statement in order to ensure rejection. The fact of past contribution may be important in strengthening the probability of future pecuniary advantage, but it cannot be a condition precedent to the existence of such a probability. This is especially evident where, as in the present case, the non-contribution is fully accounted for by the fact that the deceased had been devoting her time to preparing herself for skilled work in the future to the exclusion of immediate earnings. Her not having contributed in the past does not therefore militate in any way against the probability of that willingness to assist her parents which the jury here might reasonably find.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 23, 1912.

Solicitors for appellants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for respondent: *Billing & Co., for A. J. Evans, Pontypridd.*

[HOUSE OF LORDS.]

HOWLEY PARK COAL AND CANNEL } APPELLANTS ;
 COMPANY }
 AND
 LONDON AND NORTH WESTERN RAIL- }
 WAY COMPANY } RESPONDENTS.

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*Railway—Minerals—Support—Mines lying outside the Forty Yards Limit—
 Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85.*

As between vendor and vendee the mining sections (ss. 77 to 85) of the Railways Clauses Consolidation Act, 1845, so far as support is concerned, do not apply to mines outside the forty yards or other the prescribed limit mentioned in s. 78 ; consequently, as between a vendor of land to a railway company and the railway company, upon a purchase subject to those sections, the railway company enjoys a natural right of support for its railway from minerals belonging to the vendor lying under other lands outside the statutory limit.

Great Western Ry. Co. v. Bennett (1867) L. R. 2 H. L. 27, discussed.
 Decision of the Court of Appeal [1911] 2 Ch. 97, affirmed.

APPEAL from a decision of the Court of Appeal in so far as it reversed a decision of Eve J. (1)

The question raised by this appeal was whether, as between a vendor of land to a railway company and the railway company, upon a purchase subject to the mining sections (ss. 77 to 85) of the Railways Clauses Consolidation Act, 1845, the railway company acquires a right of support from minerals belonging to the vendor lying under other land outside the distance of forty yards from the railway.

The appellants were lessees of certain mines and seams of coal lying under and near a tunnel, known as the Morley Tunnel, which formed part of the respondents' Leeds, Dewsbury and Manchester Railway.

By a special Act passed in 1845 (8 & 9 Vict. c. xxxvi.) the Leeds, Dewsbury and Manchester Railway Company were authorized to

* *Present*: VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (E.) construct a railway from Leeds by Dewsbury to Huddersfield.
 1912 This Act incorporated the Lands Clauses Consolidation Act, 1845,
 HOWLEY and the Railways Clauses Consolidation Act, 1845. No distance
 PARK COAL was prescribed by the special Act within the meaning of s. 78 of
 AND CANNEL the Railways Clauses Consolidation Act, 1845. By a special Act
 COMPANY passed in 1847 (10 & 11 Vict. c. clix.) the railway authorized by
 v. the special Act of 1845 was vested in the respondents.
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At the date of the purchase hereinafter mentioned the lands forming the site of the Morley Tunnel, together with the adjoining lands on both sides thereof, and all the mines and minerals therein and thereunder, to a distance on either side of more than forty yards therefrom, stood limited to such uses as the Earl of Cardigan should appoint, and, subject thereto, to the use of the Earl in fee simple, and on the death of the Earl in March, 1868, the mines and minerals in and under the lands in question became vested in the trustees of his will, with powers to sell and lease with the consent of the Countess.

By an indenture dated July 10, 1852, and made between the Earl of the one part and the respondents of the other part, after reciting that the Earl had contracted with the respondents for the sale to them of the hereditaments and premises thereafter mentioned for 1800*l.*, which sum was also agreed to include compensation from the respondents for or in respect of all damage occasioned to the estate of the Earl either by severance or spoil banks or the making of shafts and openings in the construction of the tunnel thereafter mentioned or otherwise by reason of the execution of the works of the railway thereafter mentioned, in consideration of the sum of 1800*l.* paid to the Earl by the respondents, the Earl appointed to the use of the respondents in fee simple the several pieces of land therein mentioned containing together 5a. 1r. 26p. in the township of Morley in the parish of Batley in the West Riding of the county of York, being the pieces of land delineated and described in the parliamentary plan and thereon distinguished by the numbers 201 to 208 (inclusive) and 210 and 214, and also the right and privilege of making and for ever after maintaining and using a tunnel of such dimensions and with such shafts and other conveniences as the respondents should think fit in, upon, through and under the several pieces of

land whereon part of the Morley Tunnel of the respondents was then made containing together 3a. Or. 10p., being the pieces of land delineated and described on the said parliamentary plan and thereon distinguished by the numbers 192 to 196 (inclusive) and 199.

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The lands so conveyed to the respondents had been in fact compulsorily purchased by the respondents or their predecessors under the powers of the special Act of 1845. By the indenture of 1852 no mines or minerals were conveyed to or acquired by the respondents, all rights with respect to mines and minerals being left to be governed by the Railways Clauses Consolidation Act, 1845, ss. 77 to 85.

On June 27, 1868, Joseph Fearnside and others, who held certain beds of coal known as the Stone Coal and the Cromwell Bed lying under a considerable area, including the tunnel and the adjoining lands, as lessees under the Earl, gave notice to the respondents under the Railways Clauses Consolidation Act, 1845, of their intention to work these beds of coal under the tunnel. In answer to this notice the respondents gave three counter-notices to the lessees, dated July 28, 1868, May 2, 1872, and June 1, 1875, requiring the lessees to leave the coal unworked to a certain width, which, as extended by the two later notices, exceeded the distance of forty yards on each side of the tunnel. Pursuant to the notice and counter-notices above mentioned the area of the coal to be left unworked and the compensation to be paid to the lessees and the freeholders respectively were fixed, and the transaction was carried out by two indentures, dated respectively April 18, 1878, and November 29, 1878, whereby, in consideration of 13,842*l.* 14*s.* 6*d.* paid to the lessees and of 157*l.* 5*s.* 6*d.* paid to the Cardigan trustees, the leasehold and freehold interests in the coal in question were respectively conveyed to the respondents, according to the true intent and meaning of the special Acts of the respondents and the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

On January 9, 1901, a new lease for thirty years from January 1, 1901, was granted by the Cardigan trustees, with the concurrence of the Dowager Countess, to the persons then constituting the

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Howley Park Coal Company. This lease included the seams known as the Stone Coal, the Middleton Little Coal, the Cromwell Bed, and the Top Beeston Bed under an area of about 440 acres, except so much of the Stone Coal and the Cromwell Bed as was comprised in the conveyance of November 29, 1878. All of these seams lay below the tunnel, the Top Beeston Bed lying below the others.

On December 4, 1903, in consideration of a surrender of the lease of 1901, the appellants obtained from the Cardigan trustees a new lease for thirty years as from January 1, 1900, of the same seams of coal with full power of working.

In answer to notices given by the lessees of their intention to work the Middleton Little Coal under the tunnel, the respondents on two separate occasions, namely, in 1901 and 1905, required certain portions of that seam to be left unworked and paid compensation to the lessees and to the freeholders in respect thereof. The coal in respect of which compensation was paid extended in each case to a distance of more than forty yards from each side of the tunnel.

In March, 1908, the appellants gave notice to the respondents of their intention to work the Top Beeston Seam under the railway and tunnel. The respondents gave no counter-notice, but claimed to be entitled to a common law right of support for their tunnel from all mines and minerals outside the distance of forty yards from the tunnel. On the refusal of the appellants to admit this claim the respondents commenced an action against the appellants, claiming (1.) an injunction to restrain the appellants from working the Top Beeston Bed in such a manner as to withdraw vertical or lateral support from the tunnel; (2.) alternatively an injunction to restrain the appellants from working the Top Beeston Bed in such a manner as to withdraw lateral support from the tunnel outside the distance of forty yards therefrom; (3.) an injunction to restrain the appellants from working the Top Beeston Bed in such a manner as to withdraw vertical or lateral support from the Stone Coal and the Cromwell Bed or either of them.

Eve J. dismissed the action. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) reversed the

decision of Eve J. in respect of claim 2, and held that the respondents (the plaintiffs) were entitled to support from such portion of the Top Beeston Bed as lay beyond the forty yards limit, and they affirmed his decision in respect of claims 1 and 3.

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1912. Oct. 29, 31; Nov. 1. *Sir Alfred Cripps, K.C.*, and *P. O. Lawrence, K.C.* (with them *John Dixon* and *Ashworth James*), for the appellants. The question is whether, as between vendor and vendee, the fasciculus of mining sections in the Railways Clauses Consolidation Act, 1845 (ss. 77—85), commonly referred to as the Mining Code, supersedes the common law implication as regards the right of support, outside as well as within the forty yards limit. The appellants' contention is that, as between vendor and vendee, the code introduces a special statutory relationship which is wholly inconsistent with the ordinary common law implication. The respondents, on the other hand, contend that the code does not determine the relationship outside the forty yards limit, and that they have therefore acquired the common law right of support for their railway from such portion of the vendor's minerals as lies outside that limit. The importance of the question arises from the fact that mines are now worked much deeper than they used to be, with the result that the stability of the railway is liable to be affected by workings outside the forty yards limit. In 1845, when the Act was passed, nobody doubted that the forty yards limit would afford a railway company all the protection it required, and for about fifty years after the passing of the Act that protection was in fact sufficient. This fasciculus of sections is introduced by the heading (which forms part of the Act) "And with respect to mines lying under or near the railway be it enacted as follows: " That, it is submitted, is irrespective of the forty yards limit; there is no limitation except the word "near." Sect. 77 deals with subjacent mines and says that they are ipso facto excepted from the purchase by the railway company unless they are expressly included. That is distinct from the common law implication, which is that a conveyance of land includes the subjacent minerals. Sects. 78 and 79 deal with the forty yards limit. The effect of those sections is that the railway company

H. L. (E.) need not purchase minerals within that limit for the support of
 1912 its railway, but, if the mine owner wishes to work the minerals
 HOWLEY within the limit, he must give notice of his intention to the
 PARK COAL railway company. Then, if the railway company gives a counter-
 AND CANNEL notice, it gets an embargo on the mines being worked and pays
 COMPANY compensation to the mine owner in respect of that embargo;
 v. but, if no counter-notice is given, the mine owner may go on
 LONDON AND working and the railway company takes the risk of the railway
 NORTH being let down. In ss. 80 and 81, on the contrary, the Legis-
 WESTERN lature contemplates the case of an owner of mines on each side
 RAILWAY. of the railway outside as well as within the forty yards limit, and
 presupposes that an embargo has been put upon the working of
 the mines within the limit. In these circumstances s. 80 gives
 to the mine owner facilities for making airways (subject to certain
 restrictions for the safety of the railway) through the embargoed
 area, for the purpose of affording intercommunication between
 the mines outside that area on the one side of the railway and on
 the other, and s. 81 provides for payment of compensation
 to the mine owner for the disadvantages to which he is
 put by the severance occasioned by the railway and by the
 statutory provisions for the protection of the railway company.
 Those sections clearly refer to the working of mines outside
 the prescribed limit: *Midland Ry. Co. v. Miles*. (1)

Sect. 82 provides for compensation to the surface owner for any
 loss sustained by the working of such airways, the necessity for
 which was caused by the statutory embargo. Sect. 83 empowers
 the railway company to enter mines outside the forty yards limit
 in order to see whether the workings have reached the limit. The
 respondents' case is that the railway company retains all its
 common law rights except so far as they are taken away by the
 statute, but the question is whether the railway company ever had
 the position to which the common law implication applies. Not-
 withstanding these sections it is open to the railway company to
 purchase the mines and minerals in the form of an ordinary
 purchase under s. 6 of the Act: *Errington v. Metropolitan District
 Ry. Co.* (2); but, in cases to which the code applies, it deals with

(1) (1885) 30 Ch. D. 634; (1886) 33 Ch. D. 632.

(2) (1882) 19 Ch. D. 559.

the whole position, and the effect of it is that the railway company is in a particular statutory relationship as regards the surface rights quite distinct from the ordinary relationship of vendor and vendee. The code is a great advantage to both parties, and especially to the railway company, because the railway company in the first instance buys merely a statutory surface right and is not called upon to pay compensation in respect of minerals for the support of the railway until it actually wants the support, and, as regards the ascertainment of compensation, instead of there being a theoretical and almost impossible inquiry, it may be thirty or forty years in advance, that inquiry is postponed until the mines are going to be worked, when the terms of compensation can be ascertained with reasonable certainty. Hitherto the universal practice has been to treat the code as covering the whole relationship between the parties and to leave all questions of compensation in respect of minerals to be dealt with under the code when the necessity arises. If a railway company by a purchase of surface rights under the code acquires a right to lateral support from mines outside the forty yards limit, it must pay compensation for that support, because that support might interfere with valuable mining rights, and must pay at a time when no possible damage might accrue to the railway. This would involve a difficult and speculative inquiry, which it was the object of the code to prevent. It may be said that upon the appellants' construction of the code, inasmuch as the mine owner is not required to give notice of his intention to work outside the forty yards limit, the railway company is in a very helpless position as regards support from minerals outside that limit, but the answer is that it is for the promoters to say what are the limits within which they want the special powers to enable them to carry out their duties. Forty yards is the limit fixed by the statute where no limit is prescribed, but, if that distance is not sufficient, the promoters could have asked for, say, sixty yards. The respondents are in the position of a company which has not got sufficient compulsory powers to maintain its position and their remedy is to apply to Parliament for further powers. The question of the prescribed limit is for the promoters. It is for

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them to take sufficiently wide limits to ensure the safety of the railway, and, if they fail to do so, that is not a question which concerns the mine owner: *Lord Provost of Glasgow v. Farie* (1); *Holliday v. Mayor of Wakefield*. (2) Upon the construction contended for by the appellants the forty yards limit is a provision for the public safety and has nothing to do with the relationship of vendor and vendee except that, for the protection of the public and the security of the railway, special restrictions are placed upon the right of the vendor to work within the prescribed area. In *Great Western Ry. Co. v. Bennett* (3), which was treated as an appeal from *Fletcher v. Great Western Ry. Co.* (4), some of the land was in fact outside the forty yards limit, but it does not clearly appear whether that fact was brought to the notice of the House. But, however that may be, all the noble and learned Lords adopted the view that this was an exhaustive code and defined the relationship between the railway company and the mine owner. This appears particularly from the language of Lord Cranworth and Lord Westbury. Lord Cranworth says that the object of the statute evidently was to get rid of the whole of the ordinary law on the subject, and Lord Westbury, speaking of the 77th section, says that it leaves no room for the implication attached to a common law grant.

[VISCOUNT HALDANE L.C. I do not like the phrase "implication attached to a common law grant." The right to support is a natural right of property. There is a natural obligation on the owner of land not to use his own property so as to injure his neighbour's property. The law is correctly stated in Gale on Easements, 8th ed., p. 372.]

It is submitted that, whatever the nature of the right, it is a right which as between vendor and purchaser arises out of the implied relationship between the parties. [They referred to *Dalton v. Angus*. (5)] The decision in *Great Western Ry. Co. v. Bennett* (3) is in striking contrast to the two cases referred to by Lord Chelmsford of *Caledonian Ry. Co. v. Sprot* (6) and *Elliot*

(1) (1888) 13 App. Cas. 657, at p. 698, per Lord Macnaghten. (3) L. R. 2 H. L. 27.
 (2) [1891] A. C. 81, at p. 91, per Lord Halsbury. (4) (1859) 4 H. & N. 242; (1860) 5 H. & N. 689.
 (5) (1881) 6 App. Cas. 740.
 (6) (1856) 2 Macq. 449.

v. *North Eastern Ry. Co.* (1), which were decided by this House upon the construction of special Acts prior to the Railways Clauses Consolidation Act, 1845, where it was held that the common law or natural right of support remained. *Great Western Ry. Co. v. Bennett* (2) is a decision that the code establishes a relationship inconsistent with the common law implication of support arising between vendor and vendee, irrespective of the question whether the mines and minerals concerned are within the forty yards limit or not. The same view is expressed by Lord Halsbury in *Holliday v. Mayor of Wakefield* (3) with respect to the Waterworks Clauses Act, 1847, which is in substantially similar terms. In *Midland Ry. Co. v. Miles* (4), above referred to, Pearson J., whose opinion was fully adopted by Stirling J., held that the code extended to mines outside the forty yards limit and dealt with the whole question of mines and minerals. Similar views as to the exhaustive character of the code have been expressed by Lord Macnaghten in *Midland Ry. Co. v. Robinson* (5), by Lord Lindley in *Ruabon Brick and Terra Cotta Co. v. Great Western Ry. Co.* (6), by Lord Esher and Rigby L.J. in *In re Lord Gerard and London and North Western Ry. Co.* (7), and by Lord Loreburn and Lord Atkinson in *New Moss Colliery, Ltd. v. Manchester Corporation* (8), a decision on the Waterworks Clauses Act, 1847. In *Pountney v. Clayton* (9) Lord Esher stated very strongly the view that the code was exhaustive. Lord Bowen, however, without controverting that view, expressed a doubt whether the decision in *Great Western Ry. Co. v. Bennett* (2) covered the case where land was purchased outside the forty yards. That, of course, is not exactly the point at issue in this case. In considering the claim of the respondents to lateral support from minerals outside the forty yards limit it is important to ascertain precisely what is meant by the common law or natural right of support.

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(1) (1863) 10 H. L. C. 333.

(2) L. R. 2 H. L. 27.

(3) [1891] A. C. 81, at p. 91.

(4) 30 Ch. D. 634, at p. 640; 33

Ch. D. 632, at p. 642.

(5) (1889) 15 App. Cas. 19, at p. 36.

(6) [1893] 1 Ch. 427, at p. 454.

(7) [1895] 1 Q. B. 459, at pp. 464,

471.

(8) [1908] A. C. 117, at pp. 121,

124.

(9) (1883) 11 Q. B. D. 820,

at pp. 834, 837, 842.

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There is not one right of support from subjacent minerals and another right of support from adjacent minerals; it is one right and one right only. Suppose a grant by a mine owner of a piece of land with a cottage on it, excepting and reserving to himself the minerals underneath with power to work and get them. That entitles the grantor to let down the surface, and in that case the implied right of support is wholly gone and the grantee of the cottage can claim no separate right of support from the adjacent minerals: *Williams v. Bagnall* (1); and in *Aspden v. Seddon* (2) it was assumed that under such a grant the adjacent minerals were in the same position as the minerals underneath; and see *Birmingham Corporation v. Allen*. (3) *Williams v. Bagnall* (1) goes a long way towards negating the claim of the respondents in this case. The railway company might be unwilling to pay compensation in respect of the subjacent minerals and might prefer to take the risk of the surface subsiding. It would be an extraordinary result if the mine owner, while entitled to work his minerals underneath the railway, was not entitled to work the rest of the seam round it; he ought at least to have the same right to work outside the forty yards limit as within it. The intention of the code, by excepting the minerals from the conveyance to the railway company and by giving an option to the company to buy a limited right of support—or right to prevent the withdrawal of support—as occasion required, was to exclude altogether the common law or natural right of support from minerals, whether subjacent or adjacent.

Sir R. Finlay, K.C., Ernest Page, K.C., MacSwinney, and J. A. Tweedale, for the respondents, were not called on.

VISCOUNT HALDANE L.C. My Lords, the question in this appeal is purely one of law, and I find myself in such complete agreement with the judgments in the Court of Appeal that I do not feel it necessary, speaking for myself, to take time to further consider the reasons which I am going to offer to your Lordships for recommending the affirmance of the judgment.

The respondents, the London and North Western Railway

(1) (1866) 15 W. R. 272.

(2) (1875) L. R. 10 Ch. 394.

(3) (1877) 6 Ch. D. 284.

Company, are the owners, as part of their Yorkshire Railway, of a tunnel near Morley. The appellants are the lessees of various seams of coal, and amongst others of a seam known as the Top Beeston Seam, which lies near Morley Tunnel. The coal of this seam, which is the coal the subject of the present controversy, is situate beyond forty yards from the site of the tunnel.

My Lords, the question which was raised in the action, and which now comes before the House as the only question which remains to be determined, is whether the respondents were entitled to an injunction to restrain the appellants from so working their Top Beeston Seam as to deprive the tunnel of its lateral support. Broadly put in legal language the controversy is really whether, as between a vendor of land to a railway company and the railway company, upon a purchase subject to ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, —a set of sections which is commonly called the Mining Code—the railway company acquires a right of support from minerals belonging to the vendor lying under other lands outside the distance of forty yards or other the prescribed distance from the railway.

My Lords, the question turns upon the construction which is to be put upon the set of sections in the Act of 1845 to which I have referred. Those sections were introduced for the purpose of facilitating transactions between a railway company and a landowner from whom land was acquired; they were passed to render it unnecessary for the railway company to purchase out and out the minerals which were necessary for the support of the railway. It might be some time before the taking away of those minerals would affect support, and therefore it was thought less burdensome to the railway company that the owner of the land should be left with considerable freedom; and accordingly it was provided by s. 77 that the railway company should not get the minerals unless the minerals were expressly conveyed to it. That was the start off of the catena of propositions in the code. In the second place it was provided that the mineral owner should be free to work the minerals, provided he gave a thirty days' notice to the railway company, which the railway company could meet by giving a counter-

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 1912 which might or might not amount to the whole of the value of
 the minerals.

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My Lords, it was decided by this House in a case which turned on the corresponding sections, in practically identical terms, of the Scotch Railways Clauses Act, the case of *Dixon v. Caledonian and South Western Ry. Cos.* (1), that railway companies were free to give that counter-notice at any time, so that the effect of ss. 78 and 79 is this: that the railway company can obtain protection and the position of the landowner is not wholly restricted. The landowner may be able to work a considerable part of his minerals, and when the railway company requires to stop him from working further, after observation of the effect on the railway, it can then give a counter-notice, and deal with him at a later stage than the stage of the initial purchase of the land.

My Lords, that being so, it was natural that the Legislature should go on to enact other sections. Those sections amounted to this: that if the working of the minerals is prevented by the railway company having given its counter-notice, then the owner of the minerals may make such ways for air and water and so on, and such accesses as will enable him to get at the minerals without letting down the surface. If, on the other hand, no counter-notice has been given and the mineral owner chooses to work, then the mineral owner is to be at liberty to work even to the extent of letting down the surface so long as he works in the ordinary customary fashion. The railway company of course has the protection that, according to the doctrine of *Dixon v. Caledonian and Glasgow and South Western Ry. Cos.* (1), it can give its counter-notice at any time, subject, of course, to this, that so far as the minerals have been already worked out the notice cannot affect the state of things which has come into existence.

Now, my Lords, in that condition of matters, with the law so ascertained and with the statute, what is the position of a railway company situated as the respondent company is situated in this case? It has acquired the site of the tunnel; it has acquired

(1) (1880) 5 App. Cas. 820.

the protection which the statute gives as regards what is called the prescribed limit on each side of the tunnel, that is to say, forty yards, in the absence of any variation in the special Act. Within those limits it has the means of obtaining protection for its support under the railway and on each side of the railway. It has this advantage not only as regards vertical support, but as regards lateral support; and it can make such supports available by putting in motion the machinery of the Mining Code. But the question in this case is how matters stand as regards minerals outside the prescribed limits, because the minerals with which we have to deal are minerals that are altogether outside those limits; and the only point to be determined, as stated by Sir Alfred Cripps and Mr. Lawrence in their arguments, is whether the code is a new and exclusive code which lays down the law for the two parties so as to get rid altogether of any right at all to lateral support, whether within the prescribed limits or outside them.

Now, my Lords, that depends upon the construction of the sections; and when I turn to the sections, the first words that I find are the words on which reliance was placed by Sir Alfred Cripps. The title, which introduces the succession of sections, is "And with respect to mines lying under or near the railway, be it enacted as follows:" But although the word used there is "near," it is to my mind plain when you pass to s. 78 that at all events for the purposes of this section you find the interpretation of the word "near." It means lying within the prescribed distance. When this conclusion is once reached it furnishes all the light which is required in order to dispose of this appeal. It is not necessary to say whether this is the only case which is covered by this word "near" in the title to the group of mining sections in this Act of Parliament. Sections such as s. 80 may give rise to different questions. In *Miles v. Midland Ry. Co.* (1) Pearson J. suggested that s. 80, which enables ways to be made for the working of adjacent mines, extends to mines outside the forty yards limit. If so, that would give a wider interpretation to the word "near." It is not necessary, in this case, to express

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H. L. (E.) any opinion as to whether Pearson J. was right or wrong in that
 1912 case. It is sufficient to point out that what he is said to have
 ~~~~~ decided is very remote from anything that can assist the  
 HOWLEY appellants in this case. It only shews that, if he dealt correctly  
 PARK COAL with the matter with which he was exclusively concerned, a way  
 AND CANNEL made for the purposes of a mine lying at a distance from the  
 COMPANY railway, the mine may be outside the forty yards limit. I  
 LONDON AND express no opinion upon that, because it is not necessary for  
 NORTH the decision of the only question we have before us here,  
 WESTERN whether ss. 78 and 79 and the subsequent sections, so far as  
 RAILWAY. concerned with vertical and lateral support, relate to anything  
 ~~~~~ but minerals either under the railway or within the forty yards  
 Viscount limit.
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 —

My Lords, for the reasons I have stated, reasons which were fully and admirably given in the judgments of the Master of the Rolls and the other learned judges in the Court of Appeal, I think that the code, at all events so far as support is concerned, does not relate to any minerals outside those limits. It appears to me to be plain that for the purposes of provision as to the right of support the Legislature had in view what was to take place within those limits, and was not thinking of minerals lying beyond them.

Then it is said that upon the words we have been considering there has been a decision of this House in *Great Western Ry. Co. v. Bennett* (1) which is in effect a decision that the sections apply to minerals which are outside the forty yards limit, because it has been discovered, apparently since the hearing of that case, from an examination of the record, that part of the land in question,—a small part, I think, but still some part,—was outside the limit. My Lords, I can only say that I cannot regard that decision as an authority for the proposition that the sections apply to land outside the limit. The question whether the sections applied beyond the limit was not one that was present to the mind of the House, so far as one can discover from an examination of the terms of the judgments and of the arguments; and I do not think that a decision of this House on a point that was not presented to it can, from mere

(1) L. R. 2 H. L. 27.

implication of general words, be relied on as laying down a proposition which is of binding authority.

My Lords, to the other authorities quoted I make very little reference because they are in reality purely negative. *New Moss, Colliery, Ltd. v. Manchester Corporation* (1), a case which was also decided in this House, was not only decided on a different statute, but related to quite a different point; and even Sir Alfred Cripps in his argument did not, I think, place much reliance upon that case as an authority for the propositions he put forward. Then as to the other authorities which were mentioned, they really, when examined, lend no support to the appellants' arguments.

When you look at the matter on principle, free as it is from authority, it stands thus: The right to lateral support is not an easement that arises out of a grant or by prescription or by any implication of the intention of the predecessor in title in making the conveyance. It is a natural right of property. By the law of this country, when a man has got land, he is entitled to look to his neighbour, whose property is laterally supporting the land which belongs to himself, not to use that neighbour's property in such a way as to do injury to him. There is an obligation on the neighbour, and in that sense there is a correlative right on the part of the owner of the first piece of land; but the right is what has been described as a natural right of property or incident of his ownership. It is not necessary for me to enter upon the authorities for this proposition, which was one of those,—one of the few, I think I may say,—which were agreed upon by all, or nearly all, of the learned judges who took part in the decision of the great case of *Dalton v. Angus*. (2) But if that be so, then in order to take away such a natural right of property or incident of ownership you must look for something more than a conjectural intention on the part of the framers of any statute which may affect it. You must find a plain indication of intention. Now from the beginning to the end of the group of sections with which we are dealing I can find no such indication of intention. I find a clear intention to modify the rules of common law which would

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(1) [1908] A. C. 117.

(2) 6 App. Cas. 740.

H. L. (E.) otherwise have regulated the right to subjacent and lateral support under the railway or within the prescribed limit. That was the very purpose for which the code was introduced. But, with the possible exception which was referred to by Pearson J. in *Miles v. Midland Ry. Co.* (1), I cannot find anything inside the group of sections which in any way relates to minerals outside the limit. The notice and counter-notice sections and the compensation sections all relate to matters within the prescribed area; and I find no machinery provided which ousts the application of the common law as regards the natural right of lateral support from land lying beyond. It may be that the result of this case, as bearing on modern methods of working, may compel both mineral owners and railway companies to scrutinize anew their practice in making these bargains. What we have to do is to decide the question of law as it arises on the sections before us, and, speaking for myself, I cannot entertain any doubt that the judgment of the Court of Appeal was right and that this appeal ought to be dismissed; and I move your Lordships accordingly.

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 ———

EARL OF HALSBURY. My Lords, I believe I have on more than one occasion, in former cases, expressed the same opinion which I hold to-day, which is in entire accordance with the conclusion at which the Lord Chancellor has arrived. I might indeed say I am contented with the judgment of the Master of the Rolls—at all events at present I am quite contented with the judgment which the Lord Chancellor has delivered.

LORD ATKINSON. My Lords, I concur and have nothing to add. I think that the judgment of the Court of Appeal was right and that this appeal should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, in view of the importance of the question I should have liked time to consider the judgment to be delivered. I assent to the conclusion reached by your Lordships, and for the reasons which have been stated by my noble and learned friend on the woolsack.

My Lords, my view of the matter which is fundamental in the issue raised by this appeal may be put in this proposition: that there is between the owners of coterminous properties a reciprocal right to lateral support for their respective lands and a reciprocal obligation upon the part of each owner to respect that right on the part of the other. No diminution of the right on the one hand or of the obligation on the other can be effected except as the result of a plain contract of parties or the interposition of statute. This right and this obligation are natural incidents of ownership. Such a right to support does not arise from supposititious grant—it is part of the right of property itself. Nor is it of the nature of a servitude in Scotland or of an easement in England. The whole of this branch of the law was dealt with very fully by a judgment of Lord Campbell in the case of *Humphries v. Brogden*.⁽¹⁾ That learned judge there dealt with the question as one of natural right, and he incidentally alluded to the situation so frequently found in Scotland of the application of that principle of natural right to the case of urban tenements, in which, during a long period in the history of the country, there have been a variety of ownerships in the various flats. Lord Campbell cited the principle given by Erskine (*Erskine's Institute* II., ix., 11) as exactly the same as that applicable to land laterally owned. “Where a house,” says Erskine, “is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, . . . the proprietor of the ground-floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight.” So far as Scotland is concerned (and the laws of the two countries on this particular point are the same), the whole of this doctrine is brought to a focus in the passage as readjusted by that very learned editor, Mr. Guthrie, in his latest edition of *Bell's Principles*, s. 965: “A proprietor's absolute use of his land is limited by neighbourhood, so far as he is obliged to afford to his neighbour's property such support as its natural situation in relation to his requires. So far at least as

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(1) (1850) 12 Q. B. 739.

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the natural soil is concerned, the reciprocal right of support exists as a common law right incident to the ownership of land both in England and Scotland; the rules of law in both countries being the same, whether the support required is lateral as in the ordinary case of adjoining superficial estates, or vertical when the mineral strata are separated from the estate in the surface."

My Lords, that would in terms apply to the case which is before us but for the argument which has been so anxiously presented to us by the learned counsel for the appellants, that this natural right, and the doctrine which enforces it, are excluded by reason of the provisions of the Railways Clauses Act. Now, my Lords, with reference to that I lay down the first proposition, which is, that the fundamental natural right and obligation being as stated, it rests upon those putting forward an exclusion therefrom or exception thereto to justify such exclusion or exception. It is open of course to shew that *ex contractu* or by reason of the statute this has occurred. But this must be done in the plainest terms. My Lords, a case which was very anxiously considered at the time, and has been the subject of much comment since, was *Buchanan v. Andrew* (1), where the House of Lords, reversing the unanimous judgment, I think, of the Scotch Court, decided that there was such a contract which excluded the right of support.

But, my Lords, in this case what have we? It appears to me, on a review of these sections of the Railways Clauses Act, that instead of there being an exclusion of the right of support for the property acquired by way of purchasing the title by the railway company since the date of its giving notice to treat, the natural right of support is—instead of being ignored or extinguished—specially and carefully fenced and protected under the statute.

I refer in particular to the provisions of ss. 80 and 81. By the preceding sections, namely, 77 to 79, the case of minerals subjacent to the railway and within the prescribed distance adjacent thereto is dealt with. Then the case of the intercommunication of workings extending on both sides of the railway and beyond the prescribed distance is also provided for, and that is

(1) (1873) L. R. 2 H. L. Sc. 286.

done by s. 80. It deals with the case of the railway company having taken advantage of the statutory powers and paid or compensated for the subjacent and immediately adjacent minerals. In such a case communications, levels, and ways may be made through these reserved minerals, but the clause is really controlled by its concluding words "nor shall the same be cut or made upon any part of the railway or works or so as to injure the same or impede the passage thereon."

Sect. 81 also makes provisions which appear to be quite inconsistent with the idea that any immunity is procured for the owner either of minerals or of adjoining lands from the obligation of support. Within the prescribed distance and in so far as furnished by minerals that support is the subject of compensation; but quoad ultra the rights of parties fall to be regulated by the common law.

In the present case, however, what has been done, or what as the result of the argument here being successful might be done, would be to conduct digging or operations in such a way as to deprive the railway of that lateral support under the common law as the purchasers of the surface to which the railway company are entitled as incidental and natural to their ownership. My Lords, where is there a parliamentary bargain to that effect? On the contrary the parliamentary bargain seems, manifestly, to be to the very opposite effect, namely, for the protection of the railway and for the avoidance of this hazard. If the argument maintained for the appellants were correct, there would then have been granted to the owners of lands coterminous to the forty yards limit a privilege to excavate their lands to an extent which they could not have done if the lands had not been lands under parliamentary railway rights. My Lords, I am of opinion that such an immunity from the obligations incident and natural to ownership has not been given and was not intended to be given to the owners of lands adjacent to the prescribed limits. It appears to me that such an immunity would be in contradiction of what the statute has provided. Within certain limits, an arrangement for the purchase on the one hand and for the protection of both parties on the other is made, but beyond those limits there is nothing, either by express contract or by the language of the

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statute, which would warrant your Lordships in invading the common law rights, as they exist in England or Scotland, to the extent or in the manner sought.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 1, 1912.

Solicitors for appellants : *Rawle, Johnstone & Co., for Mason, Fernandes & Greaves, Wakefield.*
Solicitor for respondents : *C. de J. Andrewes.*

*Applied. GILCHESTER PROPERTIES,
v. GOMM. [1948] 1 All E.R. 493.*

[HOUSE OF LORDS.]

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Nov. 11. BUCKLETON RESPONDENT.

Vendor and Purchaser—Sale of Shares—Warranty—Breach—Warranty or Representation—Test of Warranty.

The plaintiff asked the local manager of a firm of rubber merchants, who had underwritten a large number of shares in a rubber and produce company then in the course of formation, whether his firm were bringing out a rubber company. He replied that they were. The plaintiff then asked him whether the company was all right. The manager replied that his firm were bringing it out, to which the plaintiff rejoined that that was good enough for him. In answer to further inquiries the manager told the plaintiff that he could let him have 5000 shares at a certain premium. The plaintiff agreed to take the shares, which were subsequently allotted to him. The shares having fallen in value, the plaintiff brought an action against the firm for fraudulent misrepresentation and for breach of warranty, the alleged warranty being that the company was a rubber company. The jury negatived fraudulent misrepresentation but found that the company could not be properly described as a rubber company and that the manager had given a warranty as alleged :—

Held, that there was no evidence proper to be submitted to the jury upon the question of warranty.

Decision of the Court of Appeal reversed.

Per Lord Moulton (with the concurrence of Viscount Haldane L.C.)
The question whether an affirmation made by the vendor at the time of

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, and LORD MOULTON.

sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question.

The dicta of Bayley J. in *Cave v. Coleman* (1828) 3 Man. & Ry. 2, and of A. L. Smith M.R., delivering the judgment of the Court of Appeal, in *De Lassalle v. Guildford* [1901] 2 K. B. 215, at p. 221, cannot be supported.

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APPEAL from an order of the Court of Appeal affirming a judgment of Lush J.

The action was brought by the respondent against the appellants, originally for damages for false and fraudulent representation whereby the respondent was induced to purchase 6000 shares in a company called the Filisola Rubber and Produce Estates, Limited, but by his statement of claim the respondent added an alternative claim for damages for breach of warranty, the alleged warranty being that the company was a rubber company the main object of which was to produce rubber. This appeal is concerned with the question of warranty only.

The action was tried before Lush J. and a special jury at the Liverpool Assizes.

The Filisola Rubber and Produce Estates, Limited, was promoted by Cayley, Greyel & Co. and was registered by them on April 16, 1910, with a nominal capital of 120,000*l.* divided into 1,200,000 shares of 2*s.* each.

Before its registration the appellants, by Mr. Reimers, a partner in the firm, agreed with the promoters to underwrite 360,000 shares in the company.

The appellants were rubber merchants of high standing, carrying on business in London, with branches at Liverpool and elsewhere.

On April 11, 1910, the appellants instructed their Liverpool manager, J. Dudley Johnston, to ask some of his Liverpool friends to take shares in the company. Johnston had been shewn a draft prospectus of the company by Reimers, but at this time he had no copies of the prospectus, nor did he receive any till April 16. Johnston sold a large number of shares, and he mentioned the company to (among other people) a Mr. Wright, who usually acted as broker for the respondent.

H. L. (E.) On April 14 the respondent, who was then in Wright's office,
 1912 rang up Johnston on the telephone. The account given by the
 { HEILBUT, respondent in his evidence in chief of the conversation which
 SYMONS & CO. then took place was accepted as correct by the appellants and
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“I said ‘Is that you Johnston?’ He said ‘Yes.’ I said ‘I understand you are bringing out a rubber company,’ and he said ‘We are.’ I asked him if he had any prospectuses, and he said ‘No.’ I then asked him if it was all right, and he said ‘We are bringing it out.’ I then replied ‘That is good enough for me.’ I then asked him how many shares I could have. He asked me how many I wanted and I said I would take almost any number. He said ‘I think I can let you have 5000, but the premium is 1s. 3d.’ I then said that was all right, that I would take them.” The respondent added that the reason why he was willing to take almost any number of shares was because the position the appellants occupied in the rubber trade was of such high standing that any company they should see fit to bring out was a sufficient warranty to him that it was all right in every respect.

Later on the same day the respondent again rang up Johnston and asked him if he had any more shares to sell. Johnston said that he had, but that the premium was 1s. 6d. The respondent replied that he wanted another thousand and would take them at that price. These arrangements were confirmed by two letters of April 15 written by the appellants to the respondent from their Liverpool office. The first letter related to the 5000 shares and the second to the 1000. They were both (*mutatis mutandis*) in the same form. The first letter was as follows:—

“Dear Sir

“We beg to confirm the arrangement we have made with you to secure the allotment to you of 5000 shares in the Filisola Rubber and Produce Estates in consideration of a premium of 1s. 3d. per share to be paid to us.

“Yours truly

“Heilbut, Symons & Co.”

The shares were shortly afterwards allotted to the respondent.

At this time the rubber boom was at its height, and for a short period the shares of this company were at a premium. It was subsequently discovered that of the rubber trees stated in the prospectus as existing 15,000 had been damaged by natives and 30,000 could not be found, with the result that the shares fell in value and were at the time of the trial practically valueless.

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The questions submitted by the learned judge to the jury, with their answers thereto, were:

“(1.) Was the Filisola Company a company which could be properly described as a rubber company?—No.

“(2.) Did Mr. Reimers or Mr. Johnston or both fraudulently represent that the Filisola Company was a rubber company?—No.

“(3.) Did Mr. Reimers or Mr. Johnston or both warrant that the Filisola Company was a rubber company?—Yes.”

Thereupon the learned judge entered judgment for the respondent for 40*l.* 5*s.*, the agreed amount of damages, and costs.

The appellants appealed to the Court of Appeal and asked for judgment or a new trial on the grounds, in effect, (1.) that there was no evidence on which the jury could properly find that the appellants gave any such warranty as alleged; (2.) that there was no evidence on which the jury could properly find that the Filisola Company could not properly be described as a rubber company; and (3.), alternatively, that the verdict on both these issues was against the weight of evidence.

The Court (Lord Alverstone C.J., Vaughan Williams and Farwell L.JJ.) dismissed the appeal.

1912. Oct. 15. *Buckmaster, K.C.*, and *Greer, K.C.* (with them *A. H. Chaytor*), for the appellants. 1. The judge ought not to have left the question of warranty to the jury. The interpretation of an admitted conversation is for the judge. 2. There was here no evidence upon which the jury could properly find warranty. The answer of Johnston to the question put by the respondent whether his firm were bringing out a rubber company was merely representation; and if it is representation it cannot be contract. It was not intended either by Johnston or by the respondent as a collateral contract guaranteeing the character of

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 BUCKLETON. the company. There was no animus contrahendi, and no consideration. The respondent did not bind himself to take shares until after the so-called warranty, and he was relying not on the statement as to the character of the company, but upon the reputation of the appellants in the rubber market.

— . *F. E. Smith, K.C., and A. R. Kennedy* (with them *Harold Smith*), for the respondent. The question whether Johnston intended to enter into a contractual relation with the respondent was properly left to the jury, and there was evidence to support their finding. The respondent was saying, in effect, "I want to buy shares. Are you bringing out a rubber company?" That is certainly a possible construction of the conversation. The consideration for entering into the warranty was that the respondent was prepared to enter into the contract to take shares. It is not open to the appellants to rely upon misdirection at this stage of the case, as that point was not taken in the Court of Appeal.

Buckmaster, K.C., replied.

[Reference was made to *Erskine v. Adeane* (1) and *De Lassalle v. Guildford*. (2) The question whether there was evidence to support the first finding of the jury was also argued, but in view of the decision of the House it is not necessary to consider that question.]

The House took time for consideration.

Nov. 11. VISCOUNT HALDANE L.C. My Lords, the appellants, who were rubber merchants in London, in the spring of 1910 underwrote a large number of shares in a company called the Filisola Rubber and Produce Estates, Limited, a company which was promoted and registered by other persons about that time. They instructed a Mr. Johnston, who was the manager of their Liverpool business, to obtain applications for shares in Liverpool. Johnston, who had seen a draft prospectus in London but had at the time no copy of the prospectus, mentioned the company to several people in Liverpool, including a Mr. Wright, who sometimes acted as broker for the respondent.

(1) (1873) L. R. 8 Ch. 756, 766.

(2) [1901] 2 K. B. 215.

On April 14 the respondent telephoned to Johnston from Wright's office. As to what passed there is no dispute. The respondent said "I understand you are bringing out a rubber company." The reply was "We are." The respondent then asked whether Johnston had any prospectuses, and his reply was in the negative. The respondent then asked "if it was all right," and Johnston replied "We are bringing it out," to which the respondent rejoined "That is good enough for me." He went on to ask how many shares he could have, and to say that he would take almost any number. He explained in his evidence in chief that his reason for being willing to do this was that the position the appellants occupied in the rubber trade was of such high standing that "any company they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." Afterwards, as the result of the conversation, a large number of shares were allotted to the respondent.

About this time the rubber boom of 1910 was at its height and the shares of the Filisola Company were, and for a short time remained, at a premium. Later on it was discovered that there was a large deficiency in the rubber trees which were said in the prospectus to exist on the Filisola Estate, and the shares fell in value. The respondent brought an action against the appellants for fraudulent misrepresentation, and alternatively for damages for breach of warranty that the company was a rubber company whose main object was to produce rubber.

The action was tried at Liverpool Assizes before Lush J. and a special jury. The jury found that there was no fraudulent representation by the appellants or Johnston, but they found that the company could not be properly described as a rubber company, and that the appellants or Johnston, or both, had warranted that the company was a rubber company.

The only evidence of warranty before the jury was the conversation I have quoted above. Lush J. gave judgment for the respondent for 406*l.* 5*s.*, being the agreed amount of damages. The appellants appealed to the Court of Appeal, consisting of the Lord Chief Justice and Vaughan Williams and Farwell L.JJ., on the ground that both findings ought to be set aside on the ground of want of evidence to go to the jury, or as being against the

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H. L. (E.) weight of evidence, and that the appellants were consequently
 1912 entitled to judgment. The Court of Appeal dismissed the appeal
 HEILBUT, on the ground that the evidence entitled the jury to find as
 SYMONS & CO. it did.

v.
 BUCKLETON. As the case, so far as based on fraudulent misrepresentation,
 has been decided in favour of the appellants, who acted honestly,
 it is not necessary to consider whether the company was improperly
 described as a rubber company, unless the finding of the jury
 that there was a warranty can stand. For the warranty had
 become the sole ground on which the respondent could succeed.
 As I have already stated, the whole of the evidence of the con-
 versation out of which the warranty alleged is said to have arisen
 is contained in the passages I have cited from the respondent's
 evidence in chief, and this conversation is not in dispute.

Now it is true that, when a jury has found facts, a Court of
 Appeal is not free to review unfetteredly the reasoning by which
 the jury has arrived at its conclusion. When evidence has been
 properly submitted to the jury, that body is entrusted with a
 duty which in large measure limits the province of the judge.
 If there was evidence on which the jury could properly find, its
 finding cannot be set aside, merely because if the Court had been
 dealing with that evidence the Court would have found otherwise.
 So far I agree with the Court of Appeal in the present case. "But
 the question always remains whether the evidence was, so far as
 the relevant issue is concerned, of a character so insufficient as
 to render it wrong in law for the judge to have submitted it to
 the jury as material on which to base a finding on that issue."

My Lords, as neither the circumstances of the conversation
 nor its words were in dispute, I think that the question of
 warranty or representation was one purely of law, and that it
 ought not to have been submitted to the jury.

"As soon as fraudulent representation was negatived, it seems
 to me that as to this there was no question of fact." The words
 of Mr. Johnston in the conversation proved by the respondent
 were words which appear to me to have been words not of
 contract but of representation of fact. No doubt this representa-
 tion formed part of the inducement to enter into the contract to
 take the shares which was made immediately afterwards, and

was embodied in two letters dated the next day, April 15. But neither in these letters nor in the conversation itself are there words either expressing or, in my opinion, implying a special contract of warranty collateral to the main contract, which was one to procure allotment.*

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it, and I think the learned judge who tried the case ought to have informed the jury that on the issue of warranty there was no case to go to it, and that on this issue he and the Court of Appeal ought to have given judgment for the appellants. The strongest presentation of the case for the respondent seems to me that of Farwell L.J. to the effect that there was a contract that the shares should be shares in a rubber company, and that the jury has found that the company was not a rubber company. But even on the basis of this finding I do not think that the account given by the learned Lord Justice of the transaction properly describes it. The respondent did not ask the technical question whether the company of which he had heard vaguely was correctly described as a rubber company. That he was not thinking of this point seems to me clear from the fact that when he received the letters informing him that he was to have shares in the Filisola Rubber and Produce Estates (a description which was in accordance with that in the prospectus) he made no further inquiry. What he from the first wanted to know was whether Johnston thought the company was "all right," a question to which Johnston simply replied that the appellants were bringing it out, an answer which, to my mind, simply conveyed that a firm of their standing would not be bringing it out if they did not believe it to be all right. From the evidence of the respondent, which immediately follows in the passage I have quoted, it seems to me plain that this was accepted by the respondent as the answer he wanted.

My Lords, words which on the face of them appear to be simply representations of fact may, if the context so requires, import a contract of warranty. The judgment of Lord Blackburn in *Brownlie v. Campbell*(1) is instructive on this point. But I

(1) (1880) 5 App. Cas. 925, at p. 953.

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H. L. (E.) cannot find in the words under construction, or in the circumstances, any context which required the Court to put upon them any interpretation beyond the natural one which I have stated. 1912
 HEILBUT, any interpretation I think they naturally bore, and the parties SYMONS & Co. v. themselves appear to have put it upon them. BUCKLETON.

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I wish to add that I entirely agree with the observations made by Lord Moulton in the judgment which he is about to deliver, and which I have had the advantage of reading, on the authorities as to the test of whether words can be interpreted as giving rise to a warranty. Considerable confusion has arisen from failure to keep in view the simple principle to which he refers as enunciated by Holt C.J. that an affirmation can only be a warranty provided it appear on evidence to have been so intended. The words of Holt C.J. are cited with approval by Buller J. in *Pasley v. Freeman*. (1) Not the least interesting of the older authorities which laid down the general principle, even in days when the action of assumpsit was by no means clearly marked off from that of case, is *Chandelor v. Lopus*. (2) It was there decided that the plaintiff, who was suing the defendant for misrepresentation as to the character of a precious stone sold to him, must declare on a contract, or if he declared in tort for a misrepresentation must aver a scienter. Had the moral of this decision, with its firm distinction between two wholly different causes of action, been steadily kept in view, there would have been less disposition than the *Law Reports* disclose to slip, by the easy process of leaving a supposed question of fact to a jury, from one legal conception into another which is totally distinct.

Neither the respondent nor Johnston appears to have had any question in his mind other than whether some company dealing with rubber, as to the identity of which there was no question raised, was being brought out by the appellants. For the respondent says that the position of the appellants in the rubber trade was such that "any company that they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." His interest was in the shares for which he was minded to apply, and all he was really asking for was the assurance

(1) (1789) 3 T. R. 51.

(2) (1603) Cro. Jac. 4.

I have mentioned. Had Johnston thought that he was being asked to do anything else than answer the question whether the appellants were bringing out the company, he might well have refused to pledge himself, and I do not believe that either he or the respondent, regard being had to the character of the conversation, was thinking of any other question. But if not, there was in point of law no evidence to go to the jury on the issue as to warranty, and this issue ought not to have been submitted to it. In reality the only contract entered into seems to have been the contract reduced into writing by the two letters of April 15 for procuring an allotment of shares in what was described as the Filisola "Rubber and Produce Estates" Company.

It is with great reluctance that, in a case where the Court of Appeal has agreed with the verdict of a jury and the judgment of the judge who tried the case, I feel myself bound to come to a different conclusion. But I cannot, on the facts of this case, take any other view than that the appeal ought to be allowed. Judgment should, in my opinion, be entered in the action for the appellants, and the respondent ought to pay the costs here and in the Courts below. I move accordingly.

LORD ATKINSON. My Lords, I concur.

The facts of the case have been so fully stated by the Lord Chancellor that I need not recapitulate them further than is necessary to make my judgment intelligible.

The plaintiff, the respondent in this appeal, having applied for 6000 shares in a certain limited liability company about to be brought out, called the Filisola Rubber and Produce Estates, Limited, the defendants (the appellants) procured the same to be allotted to him on April 14, 1910. The plaintiff accepted these shares and paid in respect of them the sum of 987*l.* 10*s.* The fact of this allotment having been made was communicated to him by two letters, both dated April 15, 1910, signed in the names of the defendants and addressed to him. One of these letters dealt with 5000 of these shares, the other with 1000 of them. The letters only differ from each other in the number of the shares with which they respectively deal and the amount of the premium to be paid, 1*s.* 3*d.* in the former instance and

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H. L. (E.) 1s. 6d. in the latter. It will only be necessary therefore to refer
1912 to the first. It ran as follows :—

HEILBUT,
SYMONS & Co.

“ 14, Chapel Street, Liverpool,

“ 15th April, 1910.

r.

BUCKLETON. “ E. Buckleton, Esq.,

Lord Atkinson.

“ 10, Croxteth Road, Liverpool.

“ Dear Sir,

“ We beg to confirm the arrangement we have made with you to secure the allotment to you of 5000 shares in the Filisola Rubber and Produce Estates in consideration of a premium of 1s. 3d. per share to be paid to us.

“ Yours truly,

“ Heilbut, Symons & Co.”

✓ By these letters the plaintiff was fully informed what was the full name of the company, and, so far as that name would indicate, what was its intended business. ✓ It was to be a “ produce ” company as well as a “ rubber ” company. He made no objection whatever on this account, nor any complaint that he had been ✓ misled as to the nature of its intended business.

The defendants, who are persons of high position in rubber finance and trade, had underwritten the shares of the company to a large amount. On April 11, 1910, they wrote to their agent, one Johnston, a letter asking him, for the first time, to induce his friends to apply for some shares in this company. So far as its contents are material they were as follows :—

“ The Filisola Rubber and Produce Estates will come out Monday next. It has all been underwritten, but we shall be pleased if you can induce some of your friends to apply for some shares. The capital consists of 120,000l. (2s. shares) of which 920,000 shares will be issued at par. Of these, so far, about 500,000 have been applied for. The prospectus shows profits for 1910-11 at 30 per cent., going up to 49 per cent. in 1914-15.

“ Yours faithfully,

“ Heilbut, Symons & Co.”

No information is afforded in this letter as to the character of the company, the nature of the assets it was proposed it should acquire, or the business it should, when floated, carry on.

There is, in my view, nothing in the evidence to shew that Johnston had, between this date and 2 o'clock in the afternoon of April 14, acquired any information upon any of these subjects in addition to what he on the former of these days possessed. It is, I think, vital to consider, and bear in mind, what was the precise nature and amount of that information. In his evidence in chief he stated that before April 11, 1910, at a time when he did not know that he would ever have anything to do with this company, one Mr. Reimers had, in the presence of one Mr. Vogel, both interested in the company, handed to him a draft prospectus of it. He only glanced, he said, at the draft, and from that glance, coupled with what passed between them on that occasion, merely learned that the prospectus was the prospectus of a company about to be brought out, that its title was to be Filisola, that it was to be (that is, I presume, was to operate) in Mexico, and that there were on the estates the number of rubber trees mentioned in the draft, but nothing more. He did not see a prospectus of the company till long after April 14, if at all.

Now that was the state of ignorance in which Johnston was when the conversation through a telephone, upon the effect of which this appeal turns, took place between him and the plaintiff. He stated, that he thought the main business of the company was the production of rubber, and that had he then known what the real nature of its business turned out to be he would have thought it misleading to have described it as a rubber company. He stated positively, however, that he himself had never described it as a "rubber company," or the "Filisola Rubber Company," that he might have spoken of it as the "Filisola," but otherwise always as the Filisola Rubber and Produce Estates. I cannot find that this evidence is, to any material extent, contradicted or qualified. There is not a suggestion from beginning to end of the case that his principals ever expressly or impliedly authorized or directed him to represent the company as a rubber company, or as a company whose business was solely or mainly in rubber. Happening to be in Manchester on business on the 12th of April, Johnston induced two business acquaintances or friends of his engaged in the rubber trade to apply for 30,000 of these shares. On April 13

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H. L. (E.) some persons in Liverpool, in addition apparently, applied for
 1912 many thousands of them. That, as I take it, appears from a
 HEILBUT, letter signed by him set out at p. 32 of the record. He was, it
 SYMONS & Co. would seem, rapidly disposing of these shares. They were being
 BUCKLETON. applied for briskly in large numbers. On April 14 he received
 Lord Atkinson. a letter from his principals offering him 75,000 more of their
 shares at 1s. 3d. premium, which offer he accepted. Now that
 was the condition of things when the plaintiff, to whom he,
 Johnston, had never applied to take any of these shares, or
 suggested that he should take any of them, opened negotiations
 by telephone with him.

The plaintiff's account of what passed was accepted as correct. It has been already fully stated, and it is unnecessary to repeat it in detail. It is plain, however, from it that it was the plaintiff who, in the first instance, designated or described the company as a "rubber company." The description was his, not Johnston's, but Johnston unfortunately did not correct that misdescription, or rather that imperfect or incomplete description. "If in answer to the plaintiff's question "I understand you are bringing out a rubber company?" he had replied "Not a rubber company, but a rubber and produce company," this claim for breach of warranty could hardly, I think, have been maintained. It is this omission to correct the plaintiff's incomplete description of the company, coupled with what followed on April 14, that, it is contended, supplied evidence on which a jury could reasonably find as an inference of fact, not a mere conjecture or surmise, that this agent then intended to enter on behalf of his principals into, and did enter into, a contract binding upon them, warranting this company, of whose real business he knew almost nothing, to be a company intending to engage solely or mainly in the future in the production of rubber,—a contract collateral to the written contract to take shares, but entering into, and forming part of the entire bargain between the parties.

Now, even assuming that the omission by Johnston to correct the plaintiff's misdescription of this company should be treated as an adoption of that misdescription, and be taken to be an affirmation by Johnston that the company was a "rubber company," which is putting it more strongly in favour of the

plaintiff than perhaps is legitimate, the question of Johnston's intention in making this affirmation remains. That is elementary law. It was laid down so long ago as the year 1789 by Buller J. in *Pasley v. Freeman*. (1) "It was," he said, "rightly held by Holt C.J." in *Crosse v. Gardner* (2) and *Medina v. Stoughton* (3), "and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended." The existence or non-existence of such an intention in the mind of the party making the affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed, is, in an action of breach of warranty, no doubt a question for the decision of the jury which tries the action; and all the evidence in the case touching the knowledge, conduct, words, and actions of that party, from first to last, may be considered by them in arriving at a conclusion upon this question. In the present case it would appear to me that every relevant piece of evidence given, every fact proved, tends to disprove the existence of such an intention in Johnston's mind when this conversation took place, rather than to establish it.

The jury found in his favour on the charge of fraud. He must now be taken not to have stated what he knew to be untrue in fact, and not to have recklessly stated that to be true which he did not know was either true or false. Either of these things would have amounted to fraud, and the jury have found that there was no fraud. But, reckless as it might have been in him, having regard to his comparative ignorance of all the facts, to have deliberately represented this company to be a rubber company within the meaning which these words have been held by the jury to bear in the language of the commercial world, it would have been still more reckless in him, without any authority or permission, to have contracted on behalf of his principals that this company was in fact of that character; and, moreover, it would, apparently, have been as unnecessary as it was reckless. Nothing was proved to shew that Johnston was at all anxious to induce the plaintiff to become a subscriber for these shares. Again, the plaintiff did not ask for any warranty. Indeed, he

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(1) 3 T. R. 51.

(2) (1689) Carth. 90.

(3) (1699) Salk. 210.

H. L. (E). was not satisfied with the reply to his first question, which, as I understand, it is now contended constituted the warranty; for he asked had Johnston any prospectus. And being answered in the negative, he went on to inquire if it (the company) was "all right."

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BUCKLETON. Johnston, the ignorant and reckless agent, did not answer "Yes," as one would certainly have expected him to have done if he had already given, or intended to give, the warranty relied upon; on the contrary, he gave the guarded answer, "We are bringing it out." The plaintiff then replied, "That is good enough for me."

Surely the "that" which was good enough for him was obviously the fact that a firm of the high position of the defendants in the commercial world was bringing the company out. It was this assurance, not the alleged warranty to which he never alluded, which induced him to speculate in these shares for a rise during the frenzied boom then taking place in the rubber market. But it would not be enough that Johnston should have offered to give a warranty as a term of the bargain to take these shares. The plaintiff should accept that offer and act upon it so as to make complete the collateral contract. His own language on this occasion appears to me to be inconsistent with the idea that he accepted the alleged offer or treated it as part of the bargain. For these reasons I think that there was no evidence before the jury upon which they could reasonably find, either that Johnston intended to give a warranty of these shares, or that the plaintiff intended to accept such a warranty or thought he had got it.

In what I have said I have assumed that this company was not, in fact, a rubber company, as these words, though not technical terms, are understood in the commercial world, because the jury have so found; and, I think, there was sufficient evidence before them to sustain that finding. I confess I should have had great difficulty, myself, in coming to such a conclusion, because it would appear to me that, according to the ordinary and natural meaning of language, a company formed to acquire land, to plant rubber trees extensively upon it, and to endeavour to produce large quantities of rubber in the future, does not cease to be a rubber company properly so called because, in the interval, while those trees are maturing, it raises upon its lands bananas or any other product. That, however, is, for the reason I have mentioned,

immaterial. I am, therefore, of opinion that this appeal should be allowed; that the verdict and judgment entered for the plaintiff should be set aside, and judgment entered for the defendants with costs both here and below, including the costs of the trial.

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LORD MOULTON. My Lords, in this action the plaintiff sought relief in damages against the defendants in respect of two contracts whereby the defendants undertook to procure for the plaintiff, and the plaintiff undertook to accept, the allotment of 5000 and 1000 shares in a company called the Filisola Rubber and Produce Estates, Limited. The claim for such relief was mainly based on the allegation that the plaintiff had been induced to enter into these contracts by the false and fraudulent representation of the defendants that the said company was a rubber company. This was the sole ground for relief which was put forward by the plaintiff in the proceedings before action and in the indorsement on the writ; but in the statement of claim an alternative claim for damages was included, based on the breach of an alleged warranty given by the defendants that the company was a rubber company.

At the trial the substantial case which was sought to be made on behalf of the plaintiff had reference solely to the alleged false and fraudulent representation. Evidence was given by the plaintiff and not challenged by the defendants as to a conversation which took place over the telephone between the plaintiff and Mr. Johnston, a representative of the defendants, in which undoubtedly Mr. Johnston stated that the company was a rubber company. The making of the alleged representation was therefore not in issue, and the whole of the evidence on both sides was directed to the issue whether such representation was false, and whether, if so, it was fraudulently made. No evidence was given upon the issue of a warranty having been given by the defendants that the company was a rubber company other than so far as the proof of the conversation above referred to may have amounted to such evidence.

In answer to questions put to them by the judge, the jury found (1.) that the company could not properly be described as a rubber company; (2.) that the defendants did not fraudulently

H. L. (E.) represent, but that (3.) they did warrant that it was a rubber
1912 company. Against the second of these findings there is no
HEILBUT, appeal, so that the only questions before us are as to whether
SYMONS & CO. the first and third of these findings can stand.
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BUCKLETON. The alleged warranty rested entirely upon the following
Lord Moulton. evidence. The plaintiff got a friend to ring up on the telephone
Mr. Johnston (a representative of the defendants, for whose acts
they accept the full responsibility) to tell him that the plaintiff
wished to speak to him. The plaintiff's evidence continues
thus: "I went to the telephone and I said 'Is that you,
Johnston?' He said 'Yes.' I said 'I understand that you are
bringing out a rubber company,' and he said 'We are.'"

The material part of the evidence ends here. The further
conversation related to the soundness of the company, but no
claim for relief is based on what then passed either by way of
fraudulent representation or warranty.

The plaintiff then asked if he could have some shares. Mr.
Johnston said he thought he could let him have 5000 at a
premium of 1s. 3d., which the plaintiff expressed himself ready
to take, but no bargain was then concluded. On the next day,
however, Mr. Johnston accepted in writing the offer of the
plaintiff as to taking 5000 shares. Later on the plaintiff applied
to Mr. Johnston for a further 1000 shares and obtained them at
a somewhat higher premium. In each case the terms of the
contract were reduced to writing by Mr. Johnston, acting for the
defendants, and sent to the plaintiff. The contracts were
not contracts of sale of the shares of the company (which
had not then been issued), but contracts whereby the defendants
(who were underwriters of the shares in the forthcoming issue)
undertook to procure for the plaintiff the allotment of the shares
on his applying for them. There is, of course, no conflict as to
the actual terms of these contracts, which appear from the letters.
They were acted upon by the plaintiff, who duly applied for and
received the allotments of 5000 and 1000 shares of the company,
such allotments having been procured by the defendants by the
exercise of their rights as underwriters. The plaintiff parted
with some of his shares but retained the remainder, and it is in
respect of these latter that the damages are claimed in this action.

There is no controversy between the parties as to certain points of fact and of law. It is not contested that the only company referred to was the Filisola Rubber and Produce Estates, Limited, or that the reply of Mr. Johnston to the plaintiff's question over the telephone was a representation by the defendants that the company was a "rubber company," whatever may be the meaning of that phrase; nor is there any controversy as to the legal nature of that which the plaintiff must establish. He must shew a warranty, i.e., a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The question in issue is whether there was any evidence that such a contract was made between the parties.

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It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100*l.*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

There is in the present case an entire absence of any evidence

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to support the existence of such a collateral contract. The statement of Mr. Johnston in answer to plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. It was this representation which he alleged to have been false and fraudulent and which he alleged induced him to enter into the contracts and take the shares. There is no suggestion throughout the whole of his evidence that he regarded it as anything but a representation. Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to shew the existence of any animus contrahendi other than as regards the main contracts. The whole case for the existence of a collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case.

In the history of English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the Court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognize the existence of what was sometimes called "legal fraud," i.e., that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man

liable for forgetfulness or mistake or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the Court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in the case of *Peck v. Derry* (1), when they laid down that where a defendant has made a misstatement of fact and the Court is of opinion that he had no reasonable grounds for believing that it was true he may be made liable in an action of deceit if it has materially tended to induce the plaintiff to do an act by which he has incurred damage. But on appeal to your Lordships' House this decision was unanimously reversed, and it was definitely laid down that, in order to establish a cause of action sounding in damages for misrepresentation, the statement must be fraudulent or, what is equivalent thereto, must be made recklessly, not caring whether it be true or not. The opinions pronounced in your Lordships' House in that case shew that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages.

On the Common Law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. The present case is, in my opinion, an instance of this. But in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt C.J. with respect to the contract of sale. He says: "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended." So far as decisions are concerned, this has, on the whole, been consistently followed in the Courts of Common Law. But from time to time there have been dicta inconsistent with it which have, unfortunately,

(1) (1887) 37 Ch. D. 541; (1889) 14 App. Cas. 337.

A. C. 1913.

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H. L. (E.) found their way into text-books and have given rise to confusion and uncertainty in this branch of the law. For example, one often sees quoted the dictum of Bayley J. in *Cave v. Coleman* (1), where, in respect of a representation made verbally during the sale of a horse, he says that "being made in the course of dealing, and before the bargain was complete, it amounted to a warranty"—a proposition that is far too sweeping and cannot be supported.* A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle v. Guildford* (2) which was cited to us in the argument in the present case. In discussing the question whether a representation amounts to a warranty or not the judgment says: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."

With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported. It is clear that the Court did not intend to depart from the law laid down by Holt C.J. and cited above, for in the same judgment that dictum is referred to and accepted as a correct statement of the law. It is, therefore, evident that the use of the phrase "decisive test" cannot be defended. Otherwise it would be the duty of a judge to direct a jury that if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty, whether or not the totality of the evidence shews that the parties intended the affirmation to form part of the contract; and this would be inconsistent with the law as laid down by Holt C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal in that case may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the

(1) 3 Man. & Ry. 2.

(2) [1901] 2 K. B. 215, at p. 221.

parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more. The judge, therefore, ought not to have left the question of warranty to the jury, and if, as a matter of prudence, he did so in order to obtain their opinion in case of appeal, he ought then to have entered judgment for the defendants notwithstanding the verdict.

It will, of course, be evident that I have been dealing only with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when goods are sold by description and their answering to that description becomes a condition of the contract. It is, in my opinion, a failure to recognize that in the present case the parties were referring (as is evident by the written contracts) to one specific thing only that led Farwell L.J. to come to a different conclusion from that to which your Lordships ought, in my opinion, to come in this appeal.

Order of the Court of Appeal reversed and judgment entered for the appellants. The respondent to pay the costs in the Courts below and of the appeal to this House.

Lords' Journals, November 11, 1912.

Solicitors for appellants: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondent: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)* NORFOLK AND NORTH AMERICAN } APPELLANTS;
 1912 STEAM SHIPPING COMPANY, LIMITED }
 Oct. 21. AND

VIRGINIA CAROLINA CHEMICAL COMPANY RESPONDENTS.

ET E CONTRA.

Ship—Fire—Damage to Cargo—Unseaworthiness—Bill of Lading—Exceptions
—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502.

APPEAL and cross-appeal from an order of the Court of Appeal affirming an order of Bray J. (1)

The action was brought by the Virginia Carolina Chemical Company against the Norfolk and North American Steam Shipping Company to recover 11,785*l.*, the value of a cargo of sulphate of ammonia shipped on board the defendants' steamship *West Point* at the port of Glasgow for carriage to Charleston under a bill of lading dated August 18, 1910, of which the plaintiffs were the holders to whom by indorsement the property in the goods had passed.

On August 27, 1910, during the course of the voyage, a fire broke out on board the *West Point*, in consequence of which the vessel sank and together with the cargo was totally lost.

The plaintiffs by their points of claim (paragraphs 3 and 4) alleged that the *West Point* was unseaworthy at the commencement of the voyage and that the fire and consequent loss of cargo were due to such unseaworthiness.

The defendants by their points of defence denied that the ship was unseaworthy and pleaded that they were protected by s. 502 of the Merchant Shipping Act, 1894.

* *Present*: EARL LOREBURN, LORD ASHBORNE, LORD MACNAGHTEN, and LORD ATKINSON.

Alternatively the defendants alleged that by the terms of the bill of lading under which the goods were shipped they were exempted from liability for loss. The clause of the bill of lading relied on by the defendants provided that the shipowners were not responsible for any loss or damage to the goods occasioned by (inter alia) fire on board, or by unseaworthiness provided all reasonable means had been taken to provide against such unseaworthiness.

At the instance of the defendants Hamilton J., sitting as judge in chambers, made an order for the trial of the following preliminary questions raised by the pleadings :—

1. Whether the defendants can rely on s. 502 of the Merchant Shipping Act, 1894, in answer to the plaintiffs' claim based on unseaworthiness set out in paragraphs 3 and 4 of the points of claim.

2. Whether the defendants are precluded from setting up the section by reason of the special contract contained in the bill of lading.

The trial of the two preliminary questions took place before Bray J., who decided the first question in favour of the defendants and the second question in favour of the plaintiffs, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.).

1912. May 9, 10. *Sir R. Finlay, K.C., Bailhache, K.C., and Dawson Miller*, for the defendants.

Atkin, K.C., Maurice Hill, K.C., and R. A. Wright, for the plaintiffs.

In the course of the argument the LORD CHANCELLOR (EARL LOREBURN) suggested that it would be more satisfactory that the action should go to trial on the question of fact whether the fire was due to unseaworthiness, and accordingly the appeal was adjourned by consent for this purpose. This question of fact was tried before Hamilton J., who found that the ship was not in fact unseaworthy and entered judgment for the defendants.

On October 21, 1912, the appeal and cross-appeal came on

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H. L. (E.) again upon the form of the order, when the following order was made:—

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Original and cross appeals withdrawn on the terms agreed upon between the parties; each party to pay the costs incurred by them in respect of the said original and cross appeals.

Lords' Journals, October 21, 1912.

Solicitors for appellants: *William A. Crump & Son.*

Solicitors for respondents: *Parker, Garrett & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* GILLOW AND OTHERS APPELLANTS;
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Nov. 18. COUNTY COUNCIL OF DURHAM RESPONDENTS.

Education—Non-provided School—Duty to maintain and keep efficient—Powers of Management—Appointment and Payment of Caretaker—Education Act, 1902 (2 Edw. 7, c. 42), s. 7.

The managers of a non-provided public elementary school, in exercise of the powers of management conferred upon them by s. 7, sub-s. 7, of the Education Act, 1902, are entitled to appoint a caretaker and cleaner of the school, and to have their salaries paid by the local education authority.

Order of the Court of Appeal [1911] 2 K. B. 1074, reversed, and judgment of Hamilton J. [1911] 1 K. B. 222, restored.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Hamilton J. (2)

The appellants were the foundation managers and the trustees of certain non-provided Roman Catholic public elementary Schools at Consett, in the county of Durham, known as St. Patrick's Roman Catholic Schools; the respondents were

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

(1) [1911] 2 K. B. 1074.

(2) [1911] 1 K. B. 222.

the local education authority under the Education Act, 1902. The action was brought by the appellants against the respondents and two other managers of the schools, appointed respectively by the Consett Urban District Council (the minor local authority) and the respondents, to have it declared that the managers were entitled to appoint a caretaker and cleaner of these schools and to have such caretaker and cleaner maintained and paid by the respondents, and for other relief of a subsidiary character.

The question at issue, which was whether the managers or the local education authority were the persons entitled to appoint a caretaker and cleaner of these schools, turned primarily upon sub-ss. 1 and 7 of s. 7 of the Education Act, 1902. (1)

(1) The Education Act, 1902, s. 7, provides (so far as material) as follows:—

Sub-s. 1: “The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary and have the control of all expenditure required for that purpose, other than expenditure for which under this Act provision is to be made by the managers; but in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

“(a) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and if the managers fail to carry out any such direction, the local educa-

tion authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;

“(b) The local education authority shall have power to inspect the school;

“(c) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school;

“(d) The managers of the school shall provide the school

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The schools were founded under a trust deed of November 7, 1867, and since 1870 had been carried on as public elementary schools.

For the purpose of the due and proper management of the schools it was necessary that provision should be made for cleansing the school premises and for taking care of them and preparing the same for use. The duty of a caretaker ordinarily was to keep the keys and to see that the school premises were properly locked up out of school hours, and to exercise supervision over them and see that they were not injured or interfered with in any way. The duty of a cleaner was to keep the premises washed and cleaned and in a fit and proper condition for the purpose of the same being used during school hours, or at any other time when the premises might be required, and to attend to the heating, lighting, and ventilating apparatus used in the school premises.

On April 1, 1904, when the Education Act, 1902, came into operation as regards non-provided schools, William McGuinness was the caretaker and Margaret Kane was the cleaner employed at these schools. Their appointments were continued under the Act and since that time their salaries had been provided by the respondents. Early in 1909 the respondents claimed to be entitled by virtue of certain regulations approved by them on November 10, 1904, to appoint the caretaker and cleaner of

house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local authority consider to be due to fair wear and tear

in the use of any room in the school house for the purpose of a public elementary school shall be made good by the local education authority;”

Sub-s. 7: “The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers.”

these schools, and in April, 1909, they gave notice to William McGuinness and Margaret Kane terminating their engagements. On May 31, 1909, the respondents purported to appoint Margaret Kane caretaker and cleaner of the schools. The managers refused to admit the right of the respondents to remove McGuinness from the office of caretaker or to appoint Margaret Kane as caretaker in his place, and on October 21, 1909, they issued the writ in this action.

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Hamilton J. declared (1.) that the managers were entitled to cause the schools to be properly cleaned, cared for, and attended to, and that the respondents, the local authority, were not entitled to interfere with the managers in the performance of their duties in this respect, and (2.) that the managers were entitled to have their reasonable expenses of cleaning, caring for, and attending to the schools paid by the respondents as part of the maintenance of the schools.

The respondents appealed. The Court of Appeal (Fletcher Moulton and Farwell L.JJ., Vaughan Williams L.J. dissenting) reversed the decision of Hamilton J. and dismissed the action.

1912. Nov. 5, 7. *Sir R. Finlay, K.C.*, and *T. R. Hughes, K.C.* (with them *Somers Browne*), for the appellants. The question is whether under the Education Act, 1902, in the case of a non-provided school, the appointment of a caretaker and cleaner of the school premises is vested in the managers or in the local education authority. This is a pure question of construction and is for the Court to determine. The respondents pleaded by their defence that this was a question for the Board of Education as provided by s. 7, sub-s. 3, but this defence was not insisted upon at the Bar.

[VISCOUNT HALDANE L.C. That sub-section was not intended to apply to a far-reaching question of law like the present one.]

In the view of the appellants the question turns entirely on the construction of the Education Act, 1902. [They referred to ss. 5, 6, 7, and 11.] The Court of Appeal, however, thought that the Education Act, 1870, had some bearing on the point. [They referred to ss. 5, 14, 18, and 35 of the Act of 1870.] As regards non-provided schools the scope of the Act of 1902 is to establish a dual

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control on the part of the managers and the education authority. That is inconsistent with the view of Farwell L.J. that the managers were the mere agents of the education authority. It is not a question of principal and agent, but of two co-ordinate independent authorities; and, on that hypothesis, the liability of the education authority to provide the money for caretakers and cleaners affords no necessary inference that the appointment of those officers is in their hands: *Attorney-General v. West Riding of Yorkshire County Council* (1), per Lord Davey. The managers of the old voluntary schools are continued as managers by the Act of 1902, subject only to certain obligations imposed upon them by the Act as to the way in which they are to conduct their schools, and they are left with such powers of management as have not been taken away or modified by the Act. In the absence of any express provision in the Act depriving the managers of the right to appoint a caretaker and cleaner, the appointment of those officers is vested, as it was before the Act, in the managers, as part of their general powers of management. The managers of a non-provided school have to provide the school house and to keep it in repair out of the trust funds. The local education authority are not concerned with the repair of the premises and ought not to have the appointment of the caretaker and cleaner. It is not contended that the obligation to repair of itself implies the right to appoint those officers, but it makes it eminently reasonable that the appointment should vest in the persons bound to repair. In the Act of 1902, as in the Act of 1870, the words "maintain and keep efficient" are used in contradistinction to control and management, and relate to the quality of the education, with special reference to the earning of the Government grant. The duty of maintaining and keeping efficient is imposed by sub-s. 1 of s. 7 of the Act of 1902 on the education authority, who have the control of the secular education, whereas by sub-s. 7 of the same section the general powers of management, which would include the appointment of a caretaker and cleaner, are vested in the managers. There is no inconsistency between

(1) [1907] A. C. 29, at p. 39.

the two sub-sections. [They also referred to *Crocker v. Plymouth Corporation*. (1)] H. L. (E.)

Tindal Atkinson, K.C., and *Simey*, for the respondents. The question is confined to the construction of sub-ss. 1 and 7 of s. 7 of the Education Act, 1902. That is the only Act to be considered. Before the Act came into operation the managers of the voluntary schools were masters of the situation; there was no limit to the exercise of their powers, so long as they conformed to the terms of the trust deed. There is no continuity of legal life between the managers of those schools and the managers of the non-provided schools under the Act of 1902. The managers appointed under that Act are a new statutory body, and the scope and limitations of their powers and duties are to be found within the four corners of the Act: see s. 6, sub-s. 2, and Sched. I. That Act contains every necessary power to be exercised by the education authority on the one hand and by the managers on the other. Sub-s. 7 of s. 7 deals with powers only, and, if the functions exercised by the caretaker and cleaner relate to the efficiency of the school, as is admitted, it is remarkable that the efficiency should be enforced by a mere power on the part of the managers without any corresponding duty. If, as the respondents submit, the duty of caretaking and cleansing is to be performed by the education authority, then it is clear that the authority must have the appointment of these officers, and such a construction must be put upon the provision giving powers to the managers as is consistent with this view.

The duty of maintaining and keeping efficient imposed by sub-s. 1 of s. 7 applies alike to provided and non-provided schools and is not limited to the method of instruction to be enforced, but includes keeping the school premises in a proper condition as regards health and comfort—see *Attorney-General v. West Riding of Yorkshire County Council* (2), per Lord Loreburn, and *Ching v. Surrey County Council* (3), per the Earl of Halsbury—and, to carry out this duty, the education authority are to have the control of the expenditure. On the other hand the powers of management conferred by sub-s. 7 on the managers

(1) [1906] 1 K. B. 494.

(2) [1907] A. C. 29, at pp. 35, 36.

(3) [1910] 1 K. B. 736, at p. 742.

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of a non-provided school relate, it is submitted, entirely to the details of the teaching and have nothing to do with the fabric. It is conceded that the education authority are bound to pay the wages of the caretaker and cleaner, and there is nothing in the Act to divorce the privilege of appointment from the duty of payment.

T. R. Hughes, K.C., in reply. Sect. 11, sub-s. 6, of the Act of 1902 shews that a body of managers somewhat differently constituted is substituted for the old body. But the powers are continued. *Prima facie* the managers under the new Act have the same functions as the managers under the old regime. But, apart from that, the business of the managers is to manage. The function of cleansing and taking care of the premises is part of the powers of management required for the purpose of carrying out the Act, and the powers of the education authority are not inconsistent with that. "Maintain" means providing the necessary funds and "keep efficient" means seeing that the school is kept in a condition to earn the Government grant.

The House took time for consideration.

Nov. 18. VISCOUNT HALDANE L.C. My Lords, the appellants are the managers of a non-provided Roman Catholic school in Consett, and the respondents are the local education authority under the Education Act of 1902. The question is whether the appellants or the respondents are entitled to appoint the caretakers and cleaners of the school. To decide this question it is necessary to determine what distribution of powers of management the Act makes between the managers and the local education authority.

Hamilton J., who tried the case, held that managers who elect to bring their school within the Act and to comply with its conditions still retain the general powers of management, including that of taking care of and cleaning the school, required to make it a place of public elementary education, and that these powers are not displaced by the obligation placed on the local education authority to maintain the school and make it efficient. Vaughan Williams L.J. agreed with him; but a majority of

the Court of Appeal, consisting of Fletcher Moulton L.J. and Farwell L.J., were of a different opinion. They thought that the obligation of the authority to maintain the school and keep it efficient carried with it the duty of taking care of and cleaning it, unless this power was plainly taken away and transferred to the managers.

Farwell L.J. put his conclusions thus: That the powers of management given to the managers are not general, but are limited to those required for carrying out the Act, and that, apart from these, all duties and powers were committed to the authority. He considered that it was not intended by the Legislature to limit these duties and powers by setting up a co-ordinate authority, but that the purpose was to supplement them by giving the authority the assistance of managers, while leaving the former the masters of the situation, "just as a great landowner appoints an agent to manage his estates." It was true that the authority did not appoint the managers, but in his opinion the Act had established this relation.

My Lords, the question is which of these conflicting views of the interpretation of the statute is right? It will be convenient, in considering it, to begin by ascertaining from the Education Act of 1870 what was the situation when the Act of 1902, which makes copious reference to it, passed into law. The Act of 1870 was one of a series of Acts dealing with elementary education in England, but it does not appear that any of the Elementary Education Acts, 1870 to 1900, subsequent to the first of the series, has any material bearing on the subject before us.

The Act of 1870 had for one of its main purposes a large increase in the supply of public elementary schools. The existing supply was to be supplemented by the addition of schools of a new class to be provided by school boards, and to be supplied with money, partly out of national funds and partly out of the rates. And the existing voluntary schools, or such of them as chose to conform to conditions laid down by the Act, were also to be used and assisted. These voluntary schools were to have no aid from the rates, but, provided that they complied with the provisions of s. 7, which defined a public elementary

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school, and with those of s. 97, which laid down the conditions under which a public elementary school could obtain a parliamentary grant, they were to be in as good a position as regards aid from such a grant as a school provided by a school board. Under the Act of 1870 the managers of a non-provided school were left in control of their school, and could manage the school just as they pleased, provided that those managers who wished to earn it observed the conditions requisite for the earning of the parliamentary grant.

There are other sections of the Act of 1870 which are relevant for the purposes of the present case, in so far as they shew what is meant in the Education Acts by the words "control and manage," on the one hand, and "maintain and keep efficient," on the other. Sect. 14 enacts that every school provided by a school board is to be conducted under the control and management of the board. But if the board chooses to delegate this control and management to local managers, then by s. 15 it is enabled to do so. The school board maintains and keeps efficient such a school in common with all other schools provided by the board. Sect. 18 makes provision for this purpose, using the words "maintain and keep efficient" as covering the cases of both direct and delegated control. These sections are important for the present purpose because they shew the use which the Legislature makes of the words "control and manage" as distinguished from "maintain and keep efficient," and not the less important since it is enacted by s. 24 of the Act of 1902 that any expression to which a special meaning is attached in the Elementary Education Acts, 1870 to 1900, is to have the same meaning in the Act of 1902.

Turning, then, to the earlier Act, the first thing to be observed is the situation at its passing of the voluntary or non-provided schools. These were in no way under the control of any local education authority, they derived no aid from the rates and were free from any interference with their management, excepting in so far as they had to submit to certain conditions if they desired to obtain a parliamentary grant.

The new principle which the Act of 1902 introduced was that of entitling them to rate aid from the local education authorities,

which the Act substituted for the old school boards, and the extent to which these authorities were permitted to interfere in their management can be found only in the Act itself. By s. 5 these authorities were entrusted with responsibility and control in respect of secular education in the non-provided schools.

By s. 6 the latter were, in place of their existing managers, to have a body consisting of not more than four of the foundation managers and of two nominated by the local education authorities. Sect. 7 imposed on the local education authority the duty of maintaining and keeping efficient the provided and non-provided schools alike, with the control of all expenditure required for the purpose other than expenditure for which, under the Act, provision was to be made by the managers, but subject, in the case of a non-provided school, to certain conditions and provisions. These included an obligation on the managers to carry out any directions of the authority as to secular instruction, extending to the number and educational qualifications of the teachers to be employed for such instruction, and for their dismissal on educational grounds. If the managers failed to carry out these directions, the local authority was to have power to carry them out as if they were the managers. By sub-s. 1 (*d*) the managers were to provide the school house free of charge and keep it in good repair, and make such alterations and improvements in the buildings as the authority might reasonably require, damage due to fair wear and tear in the use of rooms used for the purpose of a public elementary school being made good by the authority. By sub-s. 1 (*e*) the managers were to allow the authority the use in certain cases of rooms in the school house.

By sub-s. 5 of the same section, in the case, but only in the case, of there being more candidates for the post of pupil teacher than there were places to fill, the authority was to make the appointment. Sub-s. 7 is important. It provides that the managers of a non-provided school are to have all powers of management required for the purpose of carrying out the Act, including, subject to the powers of the authority already referred to, the exclusive power of appointing and dismissing teachers. Sect. 11, sub-s. 6, enacts that the body of managers appointed under the Act for a non-provided school are to be the managers

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for the purposes both of the Elementary Education Acts, 1870 to 1900, and of the Act of 1902, as well as, so far as respects management as a public elementary school, for the purposes of the trust deed.

My Lords, it appears to me that the scheme of the Act of 1902 thus described was to interfere with the management of voluntary schools only in the particular cases and to the extent expressly provided by the Act. These schools were to have the advantage, in addition to the parliamentary grant which they already had, of becoming entitled to maintenance by the local education authority out of the rates, and, in definite matters, no doubt of great importance, but still not extending to the whole field of management, they were not to remain as uncontrolled as they were before. Reliance has been placed, in the argument addressed to your Lordships for the respondents, on the wide meaning of the words in s. 7, sub-s. 1, "maintain and keep efficient," and "control of expenditure" required for the purpose. But I observe on this argument that from the expenditure to be controlled there is excepted, by words which follow those to which I have referred, all expenditure for which under the Act provision is to be made by the managers.

Again, the words "maintain and keep efficient" are the very words which are used in s. 18 of the Act of 1870 to cover the cases of all schools, whether controlled or managed by the school boards themselves or by bodies of managers appointed by them to whom "control and management" has been delegated. The words are apparently employed to indicate something falling short of general control and management. The schools referred to are board schools placed by the board under a body of managers who control and manage them, and look to the board itself to maintain and keep them efficient by providing the requisite funds and presumably exercising supervision. But in the case of the voluntary schools under the Act of 1902 the power of supervision and interference owes its existence not to any relation such as that which subsists between a school board, which can revoke the appointment of the body of managers to which it has delegated the control of a particular school, and the managers so appointed, but to the

words of the Act and to these alone. The managers in a voluntary school are an independent and already existing body, and all that is given to the local education authority is a defined statutory power of interference with them. Although the managers can call on the authority to maintain the school and to keep it efficient, the obligation of the authority carries with it no full power of management. For by s. 7, sub-s. 7, this power, so far as required for the purpose of carrying out the Act, remains with the managers, and I read this section as meaning that the residuary powers of management are to remain with the managers.

My Lords, the real question appears to be, What powers of interference with this management are conferred on the authority? Those that are not in terms conferred on that body remain where they were. The relationship between the two bodies concerned is not that of principal and agent, but one of co-ordinate authorities, between which powers are distributed. I cannot agree with Farwell L.J. in his view that with certain exceptions the whole of the duties and powers under the Act have been committed to the local authority, and that the object is, in words which I have already quoted from his judgment, to supplement them by giving the authority the assistance of managers, "leaving the former the masters of the situation, just as a great landowner appoints an agent to manage his estates." This appears to me to be a misconception of the scheme of the statute, which was to give the bodies of managers, who were in existence when the Act began to operate, a title to aid from the rates similar to that of a provided school, while denying to the authority, as their paymaster, any but a limited title to interfere with powers of management. I think that those powers continued to include that of general management, and, as part of this, the responsibility for looking after the school and appointing the necessary caretakers and cleaners. I am therefore of opinion that the judgment of the Court of Appeal should be reversed and that of Hamilton J. restored, and that the respondents should pay the costs of this appeal and in the Courts below. I move accordingly.

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LORD ATKINSON. My Lords, I concur. Although this case deals merely with some of the petty details of the management of the appellants' school, it involves a principle of some importance. The proceedings which have been instituted by the appellants have been, I think, provoked, if not necessitated, by the deliberate attempt of the county council of Durham to assert formally a right which, in my view at all events, they do not possess, namely, the right to appoint and dismiss at their will and pleasure the caretaker and the cleaner of a non-provided public elementary school such as the appellants' without the consent or approval, nay, even against the will, of the board of managers of the school.

The respondents, as I understood the argument addressed to your Lordships' House on their behalf, base their alleged right on the 7th section of the Education Act of 1902. They contend that the words of this section impose upon them a statutory duty to maintain and keep efficient all public elementary schools within their area which are necessary, and that this necessarily implies that they should have the right to select the officers and employees through and by whom they are to discharge that statutory duty. They further contend that the present managers of this school are a merely statutory creation, called into existence for the first time by the Act of 1902, clothed no doubt with some trifling authority and some petty powers of management, but that there is a complete breach of continuity between them and their predecessors and that they are only invested with such of the powers of these latter as this recent statute has expressly conferred upon them.

The most cursory examination of the provisions of a few sections of the Elementary Education Act of 1870, taken in connection with the 6th, 7th, and 11th sections of the Act of 1902, shews conclusively, to my mind, that both these contentions are erroneous. The words "maintain and keep efficient" are taken from the 18th section of the Act of 1870, which is one of the group of sections dealing with the maintenance and management of board schools. They have received judicial interpretation in the case of *Attorney-General v. West Riding of Yorkshire County Council*. (1) At p. 35, Lord Loreburn, then Lord Chancellor,

(1) [1907] A. C. 29.

said: "Now the obligation to 'keep efficient' cannot include an obligation to pay for religious instruction. For it means that the school is to be kept in a position to earn the parliamentary grant, and that can be earned without the giving of any religious instruction at all." This definition is consistent with provisions of the Education Code framed under the 97th section of the Act of 1870. As to the word "maintain," he said on the same page, "The other view is that, in order to maintain a school, in which the law allows the managers to make religious instruction a part of the curriculum, the local authority must take the school as it is, and bear the cost of the whole."

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This latter was the view adopted unanimously by the House in that case. The respondents were accordingly held bound to pay what was reasonable for denominational instruction lawfully given during school hours, and this, though they had no power either to require or forbid the giving of religious instruction and had no control over it, the matter being one entirely within the jurisdiction and control of the managers. At p. 39 of the report Lord Davey is represented as saying: "It is, no doubt, unusual for Parliament to impose a duty on a public body to provide public moneys for expenditure on objects which are not under its control. On the other hand, I am not prepared to say that the duty to pay is necessarily commensurate with the power of control over the application of the moneys paid, or that there is any such necessary connection between payment and control as will raise an implication in the absence of any express direction to that effect, that it was the intention of Parliament to relieve the local authority from the expense of providing religious instruction and throw it upon the managers. I think that the words of the Act mean no more than 'maintain in a state of efficiency.' I would, therefore, paraphrase s. 7 by saying that it is the duty of the local authority to provide for such expenditure as is reasonably necessary to maintain in a state of efficiency the school and all the instruction lawfully given in it, exclusive of any expenditure for which, under the Act, provision is to be made by the managers."

Lord Davey then proceeds, on the next page, to express his dissent from the law as laid down by the then Master of the

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Rolls in a passage of which the argument delivered on the part of the respondents in the present case is little more than a reproduction. The passage runs thus: "If a duty is imposed it embraces control over the instruction given, as well as the liability to make good the cost. The subject must be one in respect of which they are placed in a condition equally to perform both duties; they cannot be deemed liable to maintain in the sense of paying the cost unless they are also in a position to secure efficiency by exercising control." The principle thus laid down is the principle on which the respondents rely, and it was this principle the House held to be erroneous. It must therefore be taken to be the law that the field over which the statutory duty of the local authority to maintain and keep efficient a school and the field over which they can exercise control over the teaching and conduct of the school are not conterminous, and that there would be nothing opposed to the principle embodied in s. 7 if the local authority were bound to pay the salary or wages of a caretaker or cleaner of a non-provided school, and the managers had the power of appointing, dismissing, and exercising control over these employees.

Religious education in the school is left under the absolute control of the managers, as it was before the Act. They may appoint persons, teachers or others, to give it, whom the local authority must pay. The local authority can regulate the number and qualification of the teachers to be employed to give secular instruction, but the managers have the power to appoint these teachers subject to the consent of the local authority, which consent is not to be withheld on unreasonable grounds. They can dismiss these teachers subject to a like consent, unless the dismissal be based on grounds connected with the giving of religious instruction in the school, in which case the power of the managers is quite unfettered. Again, the managers are to carry out the directions of the local authority with regard to secular instruction, provided these directions do not interfere with reasonable facilities for the giving of religious instruction during school hours.

And, indeed, it may be worth noting, that so little is personal interference by the local authorities, or their officers, in the

management of even a provided school considered necessary for the discharge of their statutory duty to maintain and keep the school efficient, that they may, under s. 15 of the Act of 1870, delegate to a body of managers, appointed by themselves, any of their powers under that Act, except the power of raising money, and "in particular may delegate to them the control and management of any school provided by them, with or without any conditions or restrictions." The local authority as the successor of the school board can, no doubt, remove these managers, and alter their constitution or powers. And from that point of view such managers as these might fairly be regarded as the mere agents of the local authority, but the position of the managers of a non-provided school is wholly different. Of these latter, a number not exceeding four are, by s. 6, sub-s. 2, required to be foundation managers, and a number not exceeding two to be appointed by the local authority. No express power is given to the local authority to dismiss these latter, and they have no power whatever to dismiss the former. Though they may increase the whole number of these managers, the same proportion must be preserved between foundation managers and the others. To this extent the members of the body change, but the body itself, in its quasi-corporate character, remains the same.

These managers of a non-provided school are to be appointed "in place of the existing managers," and under sub-s. 6 of s. 11 they are to be managers of their school both for the purposes of the Education Acts of 1870 to 1900, and of this Act of 1902, and, so far as respects the management of the school, for the purposes of the trust deed. As a test of the powers left them one may refer to ss. 23 and 24 of the Act of 1870, which are still unrepealed. Under s. 23 the managers of a voluntary school were empowered to transfer the school and all property held on trust for it to the school board. Upon that transfer the school, so long as, and to the extent to which, the school board had any control over it, was to be deemed to be a school provided by the school board. By s. 24 the local authority are empowered to retransfer the school so transferred to them to a body of managers qualified to hold it under the trusts of the school as they existed before the transfer to the

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board, and are also empowered to convey to these trustees all the interest in the school house and the emolument vested in them.

Upon the retransfer the school is to cease to be a school provided by the board, and is thenceforth to be held upon the trusts upon which it was held before the transfer to the board took place.

These are very wide powers; but wide as they are their existence is recognized, and the exercise of them after 1902 is obviously contemplated by s. 8, sub-s. 3, of the statute of that year. The section deals with the provision of new schools by the local education authority, and sub-s. 3 enacts that any transfer of a public elementary school to or from a local education authority shall for the purposes of this section be treated as the provision of a new school.

Action in the future is obviously contemplated. It certainly appears to me from these provisions that the object or intention of the Legislature in passing the Education Act of 1902 was not at all to assimilate, as nearly as might be, the position, power, and authority of the managers of non-provided schools to those of the managers of provided schools, but on the contrary to leave to the former all the power and authority they theretofore enjoyed, so far as the same have not been cut down or altered by the provisions introduced into this statute with the design of carrying out the compromise upon which it was obviously based.

By s. 7, sub-s. 1 (a), of the Act of 1902, the local authority are authorized to give to the managers directions as to the secular instruction to be given in the school, including under this general description directions as to the number and qualification of the teachers to be employed, and as to the dismissal of any teacher on educational grounds. If the managers fail to carry out these directions, the local authority may themselves carry them out as if they were managers. But save this provision, and the special provision in sub-s. 1 (d) as to remedying the damage done by wear and tear, and the power to select some from an overplus of applicants for the post of pupil teacher, I find no express provision indicating that the local authority are to interfere in the minute details of the management of the school, such as keeping it clean. Their power of control is best exercised by their power over the funds. One of the conditions which the managers must fulfil in

order to entitle them to have their school maintained and kept efficient is that they shall provide, free of charge, a school house fit for use as a public elementary school, and shall out of their own funds keep it in good repair, fair wear and tear excepted.

A somewhat similar obligation must, in most cases I should think, have been imposed upon the managers of voluntary schools before 1902 under their trust deeds. The only officials or employees mentioned in this Act of 1902 connected with these non-provided schools are the managers, teachers, and pupil teachers. No mention is made in any part of the statute of caretakers and cleaners, and what is most remarkable, if the local authority have the power contended for in this present case, is this, that no provision is to be found requiring the approval of the managers to the selection by the local authority of such employees as these latter. Having regard to the admitted fact that some of these non-provided schools are conducted by members of the different religious orders, it would seem extraordinary that the Legislature should have conferred on the local authority power to select a person as a caretaker of a school to whose presence, in or near the school, the members of the orders might entirely object, and that they should also have power to dismiss arbitrarily, without the consent or approval of the managers, a caretaker in whom these latter had every confidence, and of whose conduct and character they entirely approved. Such a thing would be altogether out of harmony with the spirit which pervades the compromise embodied in this statute.

The 7th sub-section of s. 7 provides that the managers of such schools as these shall have "all powers of management required for the purpose of carrying out this Act, and shall (subject to the power of the local education authority under this section) have the exclusive power of appointing and dismissing teachers." During the argument counsel for the respondents were invited to indicate what, having regard to the provisions of s. 11, sub-s. 6, were the powers which the managers still possessed. In reply they indicated powers which amounted to little more than powers of inspection, and powers to see carried out the duties defined in most minute detail, at all events regarding

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caretakers and cleaners, in the orders of the local authority. I am quite unable to take that view. I think that under the provisions of this Act of 1902, especially those of s. 11, sub-s. 6, the power to manage these schools as they were managed before the statute of 1902 is, where not cut down by the provisions of s. 7, still vested in the managers of them. I find nothing in this statute to reduce that power to the attenuated shadow of its former self, as the respondents suggest. On the whole, therefore, I am of opinion that the judgment appealed from was wrong and should be reversed, and the appeal be allowed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. My views have been stated, but in far better and more cogent language than I could employ, by the learned Mr. Justice Hamilton in this case, and I respectfully adopt his opinion.

LORD MERSEY. My Lords, the question in this case is whether the appellants, who are the managers of some non-provided schools in the county of Durham, or the respondents, who are the local education authority, are entitled to appoint the caretaker of the schools. The answer to the question turns upon the construction to be put upon certain provisions of the Education Act, 1902.

The schools in question are known as St. Patrick's Roman Catholic Schools. They were founded before the Elementary Education Act of 1870, and when that Act came into operation they were being carried on by certain Roman Catholic ecclesiastics (in whom the freehold of the land and buildings was vested) under the provisions of a trust deed of November 4, 1867. Those ecclesiastics, who were called the "trustees," appointed the caretaker, and they continued to do so down to the year 1902, when the new Act came into operation. From that date the "body of managers" constituted under that Act made the appointments, and they continued to do so until the year 1909, when for the first time the respondents claimed the right to appoint.

It is conceded that from 1867 to 1902 the trustees rightfully appointed the caretaker; there was, indeed, no one else to do it. But it is said that the effect of the Act of 1902 was to divest the

trustees of the right and to vest it in the respondents. It is therefore necessary to examine the statute to see whether this is so.

Sect. 5 of Part III. of the Act provides that the local authority shall have the control of all secular instruction in non-provided schools. Religious instruction is left untouched. Sub-s. 2 of s. 6 provides that such schools shall, in place of the existing managers, have a body of managers consisting partly of "foundation managers" and partly of managers appointed by the local authority. Sect. 11, sub-s. 1, enacts that the "foundation managers" shall be managers appointed under the provisions of the trust deed of the school, and sub-s. 6 of the same section provides that the body of managers so appointed shall be the managers of the school both for the purposes of the Elementary Education Acts, 1870 to 1900, and this Act and "so far as respects the management of the school as a public elementary school for the purpose of the trust deed." Sub-s. 5 of s. 24 enacts that the expression "trust deed" shall include any instrument regulating the trusts or management of a school. Stopping at this point, the effect of the legislation appears to me to be to make the new statutory body of managers the successors of the trustees under the old school deed and to vest in them many of the rights and powers which those trustees previously had, including the right and power to appoint a caretaker. But then comes s. 7 of the Act, and it is upon this section that the respondents mainly rely. It is a section divided into seven sub-sections. Sub-s. 1 enacts in the first place that the local authority shall "maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers." It is to be noted that this provision makes no distinction between provided and non-provided schools. It deals with all schools, and it is argued that, as the statute casts upon the local authority the obligation of maintaining and keeping efficient all schools, it gives to the local authority by inference the power to do what is necessary in that behalf, among other things to see to the cleanliness and sanitary condition of the schools and in that connection to appoint caretakers.

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The subsequent words of the sub-section do point a distinction between provided and non-provided schools, for they say that in the case of a school not provided by the local authority the obligation to maintain and keep efficient shall last only so long as certain conditions and provisions are complied with, but, inasmuch as it is not suggested that these conditions and provisions have not been complied with, it appears to be unnecessary to consider the distinction in connection with the respondents' argument; the point remains that the obligation is cast on the local authority of maintaining and keeping efficient all schools. If there were no more in the section I think the argument would be of much weight. But there is more in the section. By the 7th sub-section it is provided that "the managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers"; and one has to consider what are the powers of management given to the managers by these words. It is said by the appellants that the powers referred to must include the power to keep the school houses fit for use; and thus the litigants extract from one section two arguments which are inconsistent the one with the other. It is, however, obviously the duty of your Lordships' House to reconcile, if possible, the apparent inconsistencies in the section, and for my part I think it is quite possible. Without attempting to define the limits of the expression "maintain and keep efficient" (a task I think it is inadvisable to attempt), I am of opinion that the expression never was intended to include such a duty as that of keeping the school houses clean. I may state a few considerations which lead me to this conclusion. From the establishment of the school in 1867 down to the passing of the Act of 1902, this and all similar duties had been discharged by the trustees under the school deed, the trustees employing such labour as might be necessary for the proper discharge of those duties. Under the Act of 1902 the managers are the persons who have to provide the school houses and to keep them in good repair (s. 7, sub-s. 1, clause (d)). Moreover, if, as may happen,

the local authority should require the use of any room in the school out of school hours, they are to have such use free of charge, but afterwards "the managers shall take care that . . . the room is left in a proper condition for school purposes" (s. 7, sub-s. 2). Then, again, the managers are the persons who are to have the exclusive control of religious instruction. I think, if it had been intended to take from the successors to the trustees the care of the school house which the trustees themselves had always had and to vest it in the local authority, plain words to that effect would have been introduced into the Act. There are no such words. And I think, further, that the provisions to which I have referred point to such an occupation of the buildings by the managers as makes it reasonable to suppose that the Legislature intended that the managers should have the care of the school buildings in their hands. When to these considerations are added the provisions of sub-s. 7 of s. 7, which specifically give to the managers "all powers of management," I find no difficulty in holding that the power of appointing a caretaker rests in the hands of the managers. There is nothing in the statute to take away the powers exercised by the trustees before the statute; and the terms of the statute itself, by reasonable if not by necessary inference, shew that the Legislature intended that the body of managers (the trustees' successors) should take up and exercise those powers so far at all events as they relate to such an appointment as that in question.

For these reasons I think that the judgment of the Court of Appeal should be set aside and the judgment of Hamilton J. restored.

Order of the Court of Appeal reversed and judgment of Hamilton J. restored. The respondents to pay the costs in the Courts below and of the appeal to this House.

Lords' Journals, November 18, 1912.

Solicitors for appellants: *Ridsdale & Son, for Watts & Carr, Liverpool.*

Solicitors for respondents: *Maude & Tunnicliffe, for Harold Jevons, Durham.*

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H. L. (E.)* GEORGE ATTENBOROUGH & SON . . . APPELLANTS;
 1912 AND
 Nov. 19. SOLOMON AND ANOTHER RESPONDENTS.

Executor—Power to pledge Personal Chattels—Pledge by one of two Executors and Trustees—Validity—Payment of Debts—Passing of Residuary Account—Lapse of Time—Assent to Trusts of Will.

A testator by his will, after appointing two persons executors and trustees and giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. Fourteen years after the testator's death one of the executors, without the knowledge of his co-executor, pledged certain plate forming part of the testator's residuary estate with a firm of pawnbrokers, who had no notice that he was not the absolute owner thereof, and misapplied the money so raised. All the debts and legacies, so far as was known, were paid, and the residuary account was passed, within one year of the testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor, the transaction was discovered and an action was brought by the co-executor and a new trustee against the pawnbrokers to recover the plate:—

Held, that the proper inference to be drawn from the facts was that at the date of the pledge the executors had assented to the trust dispositions taking effect and held the plate not as executors but as trustees; that, therefore, the deceased executor had no power to pledge the plate and the existing trustees were entitled to recover it.

Decision of the Court of Appeal [1912] 1 Ch. 451, affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Joyce J. (2)

The appellants were pawnbrokers; the respondents were the existing trustees of the will of Moses Solomon, deceased (hereinafter called "the testator").

The question raised by this appeal was as to the right of the appellants, with whom certain silver plate, which formed part of the testator's residuary estate, was pledged by Alfred Abraham

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1912] 1 Ch. 451.

(2) [1911] 2 Ch. 159.

Solomon, one of the executors and trustees of the will, in his own name, to retain the plate as against the respondents. H. L. (E.)

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The testator by his will, dated March 20, 1878, appointed his sons, A. A. Solomon and the respondent J. D. Solomon, executors and trustees of his will, and, after bequeathing certain pecuniary legacies, devised and bequeathed his residuary estate to his said trustees upon trust to sell the same and after payment of all expenses to divide the residue into four equal parts. And the testator directed that each of the said A. A. Solomon and the respondent J. D. Solomon should retain one of such fourth parts for his own use and benefit and should stand possessed of the two remaining fourth parts upon trusts for the benefit of his daughters Harriet Wolff and Sarah Levy. The testator died on March 20, 1878, and his will was proved on October 30, 1878, by both the executors.

All the debts, legacies, funeral and testamentary expenses, and duty were paid within one year of the testator's death, and in March, 1879, the residuary account was sent in by the respondent J. D. Solomon and was duly passed. The account contained a declaration by the said respondent whereby he offered to pay the sum of 59*l.* 9*s.* for the duty after the rate of 1*l.* per cent. upon the sum of 5945*l.* 6*s.* 5*d.*, being the balance of the residue and moneys to which he was entitled and which he intended to retain for his own use and for the use of Alfred Abraham Solomon, Harriet Wolff and Sarah Levy, being sons and daughters of the deceased.

Part of the residuary estate consisted of the plate in question, which was in the sole possession of A. A. Solomon pending the ultimate division of the trust estate.

On March 24, 1892, A. A. Solomon pledged this plate with the appellants in his own name to secure an advance of 65*l.* and interest thereon. The appellants had no notice that this plate formed part of the testator's residuary estate or that A. A. Solomon was not the absolute beneficial owner thereof.

The money so raised was applied by A. A. Solomon in paying a personal debt due from him to the respondent J. D. Solomon.

A. A. Solomon died on January 22, 1907, and on January 30, 1907, the respondent Richard Chadwick was appointed a trustee of the will jointly with the respondent J. D. Solomon.

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The testator's estate had not yet been completely distributed. In 1908 the respondents discovered for the first time that the plate had been pledged with the appellants. The appellants refused to hand over the plate except upon payment of the full sum for which it had been pawned, and they threatened to sell unless the pledge was immediately redeemed. Thereupon the respondents commenced an action against the appellants claiming an injunction restraining them from selling the plate, a declaration that the appellants had no right or title in or to the same, and the return thereof to the respondents.

Joyce J. dismissed the action, but his decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.).

1912. Nov. 15, 18, 19. *T. R. Hughes, K.C.*, and *W. M. Cann*, for the appellants. (1.) Executors have full power to pledge the estate of their testator. (2.) Any one of the executors can exercise the powers of all. (3.) Notwithstanding any lapse of time a purchaser or mortgagee is entitled to assume that the transaction is required for the purposes of the estate and is not bound to make inquiries.

[VISCOUNT HALDANE L.C. The question is whether the executors must not be taken to have assented to the transfer of these chattels to themselves as trustees: *In re Smith*. (1)]

The question there was whether for a certain purpose of the Conveyancing and Law of Property Act, 1881, the executor held the residue on trust, not whether he had ceased to be an executor. That case does not lead to the conclusion that when an executor has, so far as he knows, cleared the estate of liability his functions as executor cease. So long as assets remain in his hands, even though they may be affected by an express trust, still he has all the powers of an executor over them. Here the pledgor's possession was undoubtedly lawful in the first instance, and it is a strong thing to say that he has parted with that possession as executor in the absence of some definite act. If a man is originally an executor and the assets are still in his hands he retains the power to sell or pledge them, and any purchaser or pledgee of the

(1) (1889) 42 Ch. D. 302.

chattels from such executor, without any representation from him as to the title under which he holds the chattels, may rely on whatever title he has. If a purchaser were bound in every case to ask an executor who happened also to be a trustee whether he has transferred to himself as trustee, great inconvenience would result. The original title of the pledgor was as executor, and it rests on the respondents to shew that that title has been divested. Here there has been no assent in fact. Further, it is submitted that the question of assent does not arise in the case of executors handing over the residue to themselves as trustees, and there is no reason for such assent, since it would involve parting with their paramount title. The question of assent only arises as between an executor and a beneficiary, for the only object of the assent is to put the legatee in possession of his property.

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[VISCOUNT HALDANE L.C. In Williams on Executors, 10th ed., p. 1106, it is stated that "in certain cases, the assent of the executor may be presumed; upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty," and *Cray v. Willis* (1) is cited in support of that proposition.]

Only two circumstances can be relied on by the respondents as affording any indication of a change in the character in which the executors held the residue: (1.) the residuary account, (2.) the lapse of time. As regards the residuary account its sole object is to shew the relationship of the beneficiaries to the testator and the rate of duty payable, and, having regard to the purpose of the account, the declaration which the executor is required to make therein does not constitute a declaration of trust, but is made alio intuitu: *In re Rowe*. (2) The change of title can only be effected by some act which is not referable to executorial duties—*Doe v. Sturges* (3); and the residuary account, being referable to the executors in their character of executors and not of trustees, suggests nothing. Nor does lapse of time afford any presumption that all the duties of the executors have been performed. Any one dealing with an executor, whether he knows that the man is an executor or not, and no matter how long the interval

(1) (1729) 2 P. Wms. 529.

(2) (1889) 58 L. J. (Ch.) 703.

(3) (1816) 7 Taunt. 217, at p. 222.

H. L. (E.) after the testator's death, is entitled to assume, in the absence
 1912 of notice, that the property is being parted with for a proper
 ATTEN- purpose, and is not concerned either with the state of the testator's
 BOROUGH assets—*Mead v. Lord Orrery* (1); *M'Leod v. Drummond* (2);
 v. *Forbes v. Peacock* (3); *In re Venn and Furze's Contract* (4)—or
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 and *Charlton v. Earl of Durham* (6), which is directly in point.
 In the present case the Court of Appeal treated it as settled law
 that a purchaser who knew that he was dealing with an executor
 was not bound to inquire whether the executor was acting in the
 discharge of his duties, but held that a purchaser who did not
 know was bound to inquire; but the title does not depend on the
 knowledge of the purchaser. [They also referred to *Elliot v.*
Merryman (7); *Phillipo v. Munnings* (8); *In re Tanqueray-*
Willaume and Landau (9); *In re Whistler*. (10)]

Younger, K.C. (with him *Cozens-Hardy, K.C.*, and *Roger*
Turnbull), for the respondents. Ex concessis, in 1892 all the debts
 were paid and there was no necessity for pledging any part of the
 estate for any executorial purpose whatever. The pledgor had
 no power from the true owners to pledge these goods, and in an
 ordinary case a pawnbroker has to take the risk of any infirmity
 in the title: *Cundy v. Lindsay*. (11) In 1892, and for thirteen
 years before that date, this plate was in the hands of the executors
 as trustees. That is established in the first place by the
 residuary account, which shews that the debts and legacies have
 either been paid or provided for: *Tyson v. Jackson*. (12) *In re*
Rowe (13) does not support the proposition for which it was cited.
 There is the same necessity for assent to a bequest of residue as
 to a bequest of a specific or pecuniary legacy: *Austin v.*
Beddoe (14); *Mead v. Lord Orrery* (15); and upon assenting to a

(1) (1745) 3 Atk. 235.

(8) (1837) 2 My. & Cr. 309.

(2) (1807) 14 Ves. 353; (1810)
 17 Ves. 152.

(9) (1882) 20 Ch. D. 465.

(3) (1846) 1 Ph. 717.

(10) (1887) 35 Ch. D. 561.

(4) [1894] 2 Ch. 101, at p. 114.

(11) (1878) 3 App. Cas. 459, at
 p. 463.

(5) (1859) 27 Beav. 553.

(12) (1861) 30 Beav. 384.

(6) (1869) L. R. 4 Ch. 433.

(13) 58 L. J. (Ch.) 703.

(7) (1734) Barn. Ch. Rep. 78.

(14) (1893) 41 W. R. 619.

(15) 3 Atk. 235, at p. 239

bequest given in trust the executors forthwith become trustees: H. L. (E.)

Dix v. Burford. (1)

[He was stopped].

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VISCOUNT HALDANE L.C. My Lords, the facts out of which this litigation has arisen lie in a short compass. The question is whether certain articles of silver plate, which were pledged by one A. A. Solomon to the appellants under a contract of pawn, were validly pledged. A. A. Solomon was one of the executors of the will of Moses Solomon, which was made in 1878. The testator appointed A. A. Solomon and J. D. Solomon to be the executors and trustees; and after giving certain pecuniary legacies the testator devised and bequeathed the residue of his real and personal estate of every kind to his trustees upon trust for sale, payment of expenses, and division of the residue into four equal parts, two of which were settled. The will was duly proved, and very shortly after, in the next year, J. D. Solomon, the other executor, put in a residuary account. In so doing, as one of two executors has authority to act for both, he bound his co-executor. The account shewed the particulars of the estate of the testator and that the debts had been paid. It concluded with a declaration in which the executor stated that the account was a true account and that he offered to pay duty upon a balance of residue mentioned "to which I am entitled and intended [*sic*] to retain to my own use and for the use of Alfred Abraham Solomon, Harriet Wolff and Sarah Levy," being the beneficiaries under the will. My Lords, the only other point I need mention is that in Mr. J. D. Solomon's evidence given at the trial he said that the debts were all paid very shortly after the testator's death.

Now, my Lords, the meaning of a residuary account must of course be construed with reference to its purpose. It is not a document which is intended to have the operation of a declaration of trust; but it may be looked at as against the executor as evidence of what he regarded as being the position of the estate. I think it is plain from that document that Mr. J. D. Solomon regarded the debts as having been all paid and the estate as ready

(1) (1854) 19 Beav. 409.

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My Lords, having said so much, I will conclude the history of the case. The chattels which form the subject of the appeal were articles of silver plate which belonged to the testator, and they appear to have been left in the custody of A. A. Solomon. A. A. Solomon held them as custodian for the executors and trustees, and he retained possession of them till the year 1892, when he improperly pawned them with the appellants. The latter had no knowledge of his position and dealt with him as an ordinary customer. He died afterwards, and it was subsequently discovered that the plate was pawned, and the respondents, being the trustees for the time being of the will, brought an action against the appellants to recover the articles pledged as having been pledged without any title on the part of A. A. Solomon to so deal with them.

The action was tried before Joyce J., and Joyce J. decided in the appellants' favour, taking the ground that A. A. Solomon retained the powers of [an executor notwithstanding the lapse of time, and was therefore in a position to pledge. There was an appeal to the Court of Appeal, and the Court of Appeal unanimously decided that Joyce J.'s judgment was wrong. Fletcher Moulton L.J. based his judgment on the ground that the executor had ceased to hold the plate as executor, and that the property in it had, from the date of the residuary account, been in the trustees, so that there was no title to deal with these chattels which existed in A. A. Solomon in 1892.

My Lords, I agree with the judgment of Fletcher Moulton L.J. The real point is, I think, more simple than it was regarded as being by his colleagues in the Court of Appeal, and the question is largely one of fact. The general principles of law which govern this case are not doubtful. The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator, which vests him with the plenum dominium over the testator's chattels. He takes that, I say, by virtue of his office. The will becomes operative so far as

its dispositions of personalty are concerned only if and when the executor assents to those dispositions. It is true that by virtue of his office he has a general power to sell or pledge for the purpose of paying debts and getting in the money value of the estate. He is executor and he remains executor for an indefinite time. Authorities were cited to us by Mr. Hughes to the effect that an executor can sell at a period long after the death of the testator, and that where it is a question of conveyancing, as for instance in the case of the sale of leaseholds by the executor, the purchaser is not entitled to make requisitions as to whether debts remain unpaid, because the executor's office remains intact and he may exercise his functions at any time. That is true as a general principle, and I have no comment to make upon it except that it is qualified by another principle, which is this: The office of executor remains, with its powers attached, but the property which he had originally in the chattels that devolved upon him, and over which these powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent.

Now, my Lords, in view of the residuary account passed as it was and in the form it was, in view of the evidence of Mr. J. D. Solomon, and in view of the fourteen years which had passed since the testator died before the time when Mr. A. A. Solomon made the pledge to the appellants in 1892, I am of opinion that the true inference to be drawn from the facts is that the executors considered that they had done all that was due from them as executors by 1879, and were content when the residuary account was passed that the dispositions of the will should take effect. That is the inference I draw from the form of the residuary account; and the inference is strengthened when I consider the lapse of time since then, and that in the interval nothing was done by them purporting to be an exercise of power as executors. My Lords, if this be so, this appeal must be

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disposed of on the footing that in point of fact the executors assented at a very early date to the dispositions of the will taking effect. It follows that under these dispositions the residuary estate, including the chattels in question, became vested in the trustees as trustees. That they were the same persons as the executors does not affect the point, or in my opinion present the least obstacle to the inference. But if that was so, then the title to the silver plate of A. A. Solomon as executor had ceased to exist before he made the pledge of 1892. What then was the position of the appellants? By the law of England the property in a chattel must always be in one person or body of persons. When the person who owns the chattel makes a pledge of it to a pawnbroker he is not purporting to part with the full property or giving any thing which is in the nature of a title to that property to the pawnee, excepting to a limited extent. The expression has been used that the pawnee in such a case has got a special property in the chattel. My Lords, that is true in this sense, that the pawnbroker is entitled to hold the chattel upon the terms that when the possession has been lawfully given to him it is not to be taken away from him, and that if default is made in the redemption of the pledge, or it may be in the payment of interest, he may go further and by virtue of his contract, assuming it to be valid, sell the chattel. But the contract of pawn is simply an illustration of that contract of bailment of which Holt C.J. gave the famous exposition in the great case of *Coggs v. Bernard* (1); and it rests upon this foundation, that the property remains in the bailor, and that the bailee, whether it be a bailment by way of pawn or in any other form, simply takes at the outside a right to the possession dependent on the validity of the title of the bailor with the other rights possibly superadded to which I have referred. If that be true, upon no hypothesis did the appellants get a legal title to the property in the plate. When A. A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees. The latter were the true owners and they are now in a position to maintain an action,

(1) (1703) 2 Ld. Raym. 909.

which under the old forms would have been an action of trover or detinue, to recover possession of the chattels free from the restrictions on the right to reclaim possession which were sought to be imposed by the contract between A. A. Solomon and the appellants. My Lords, the property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A. A. Solomon, but in A. A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it.

A great deal of authority has been cited to us in the course of this case. Mr. Hughes has said, and with truth so far as the bare proposition goes, that persons dealing with executors have not got to inquire whether the debts are paid, and must assume that their powers are operative. Two of the learned judges in the Court of Appeal appear to have felt some concern over the question of the relevancy of that proposition. But the question which goes to the root of this case is one which renders such a proposition wholly beside the point. If I am right, there is no question here of an executor acting in the execution of his powers, so far as this residue is concerned. The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs *virtute officii*; and their right *in rem*, their title of property, had been transformed into a right *in personam*,—a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision. My Lords, that right always remains to the executors and they can always exercise it, but it is a right to bring an action, not a right of property, and not such a right as would enable such a pledge as this to be validly made. I have therefore arrived at the clear conclusion that at the time when the pledge to Messrs. Attenborough was attempted A. A. Solomon had no title in virtue of

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LORD ATKINSON. My Lords, I concur and have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

Appeal dismissed with costs.

Lords' Journals, November 19, 1912.

Solicitor for appellants: *Stanley J. Attenborough.*

Solicitors for respondents: *Cox & Lafone.*

[HOUSE OF LORDS.]

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Water Rate—Quantum—Rateable Value—Valuation List in force at Commencement of Quarter—Supplemental Valuation List—Provisional Valuation List—Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), ss. 8, 13—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 43—47.

The defendant was the occupier of licensed premises in the city of London, which were supplied with water by the plaintiffs under the Metropolitan Water Board (Charges) Act, 1907. By s. 8 of that Act payment for water so supplied was to be at a rate per annum not exceeding 5 per cent. of the "rateable value" of the house in respect of which the supply was required, and by s. 13 the rateable value "for the purposes of this Act" was to be determined "by the valuation list in force at the commencement of the quarter" for which the water rate accrued. The water rate was payable in advance by four quarterly payments on April 1, July 1, October 1, and January 1 in each year.

In 1908 the quinquennial valuation list for the parish of the city of London was altered by the making of a supplemental valuation list which came into force on April 6, 1909. By this supplemental list the rateable value of these licensed premises was shewn at 400%.

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

On June 2, 1910, the overseers of the parish sent to the assessment committee pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list in which the licensed premises were included at the reduced rateable value of 399/., and on June 23, 1910, the clerk of the committee served on the defendant as occupier a copy of so much of the provisional list as related to these premises, with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value of the premises to 234/. On October 1, 1910, the water rate for the quarter commencing on that date became due from the defendant to the plaintiffs. The action was brought to determine the question whether for the purposes of this water rate the valuation list in force on October 1, 1910, was the supplemental valuation list or whether, upon the construction of sub-ss. 3 and 8 of s. 47 of the Valuation (Metropolis) Act, 1869, the provisional list related back to June 23, 1910, and came into force as from that date:—

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Held, that the valuation list in force on October 1, 1910, was the supplemental list unaltered by the provisional list, and that the defendant was liable to pay the rate payable on that date on the rateable value of 400/.

Decision of the Court of Appeal [1912] 2 Ch. 546, reversed, and decision of Parker J. [1912] 1 Ch. 296, restored.

APPEAL from an order of the Court of Appeal (1) reversing an order of Parker J. (2) made on a special case stated by consent of the parties.

The respondent was the occupier of licensed premises known as the "Brown Bear," 79, Aldersgate Street, in the parish of the city of London. These premises were supplied with water by the appellants under the provisions of the Metropolitan Water Board (Charges) Act, 1907 (hereinafter referred to as the Charges Act).

By virtue of s. 70 of the Waterworks Clauses Act, 1847, which was incorporated in the Charges Act, and of s. 15 of the Charges Act, water rates were payable by the respondent to the appellants in advance by equal quarterly payments on April 1, July 1, October 1, and January 1 in each year.

The action was brought by the appellants against the respondent to have it determined what was the rateable value of the premises upon which the water rate payable for the quarter from October 1 to December 31, 1910, should be calculated. (3)

(1) [1912] 2 Ch. 546.

in full in the report of the case before
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(2) [1912] 1 Ch. 296.

(3) The plaintiffs' claim is set out

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Under s. 8 of the Charges Act the appellants were entitled to payment in respect of the supply of water for that quarter at the rate of 5 per cent. of the rateable value of the premises.

Sect. 13, sub-s. 1, provided: "The rateable value of any house or building or part of a house or building for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included."

Sect. 43 of the Valuation (Metropolis) Act, 1869, provided: "The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come into force at the beginning of the year (commencing on the sixth of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned."

Sect. 46 provided for the making of a supplemental list.

Sect. 47 provided that if in the course of any year the value of any hereditament was from any cause increased or reduced the following (among other) provisions should have effect:—

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament:—"

"(3.) On the receipt of the list the clerk of the assessment committee . . . shall serve on the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament. Every copy shall be accompanied by a notice specifying a day . . . on or before which any objection to the provisional list may be made . . ."

"(7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of

the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers : ”

“(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force : ”

“(10.) A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly”

A quinquennial valuation list for the parish of the city of London had been made in the year 1905 and came into force on April 6, 1906. In the year 1908 a supplemental valuation list was made for this parish and came into force on April 6, 1909, and thereafter formed part of the valuation list in force in the parish. The rateable value of the “Brown Bear” was shewn in this supplemental valuation list at the sum of 400*l*.

On June 2, 1910, the overseers of the parish sent to the assessment committee thereof, pursuant to s. 47, sub-s. 1, of the Valuation (Metropolis) Act, 1869, a provisional list in which the premises were inserted at a rateable value of 399*l*. On June 23, 1910, the clerk to the assessment committee served upon the respondent a copy of so much of the provisional list as related to his premises together with a notice, as required by s. 47, sub-s. 3, of the Act. On October 3, 1910, the assessment committee considered the provisional list and altered the rateable value of the premises as shewn therein and returned the list and the copy thereof to the overseers after being dated and signed by their clerk as required by s. 47, sub-s. 7, of the Act. The rateable value of the premises was shewn in the provisional list as so dated and signed at the sum of 234*l*.

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The question for the opinion of the Court was whether upon the true construction of the Metropolitan Water Board (Charges) Act, 1907, and under the circumstances above set out the water rate in respect of these premises for the quarter from October 1 to December 31, 1910, ought to be calculated upon the rateable value of the premises appearing in the quinquennial valuation list, 1905, as altered by the supplemental valuation list made in the year 1908, but not as altered by the provisional list, namely, 400*l.*, or whether the rate for that quarter ought to be calculated upon the rateable value appearing in the quinquennial valuation list as altered, *inter alia*, by the provisional list, namely, 234*l.*

Parker J. held that the valuation list in force on October 1, 1910, was the supplemental list unaltered by the provisional list, but his decision was reversed by the Court of Appeal (Farwell and Kennedy L.JJ., Cozens-Hardy M.R. dissenting), who held that the provisional list came into force on June 23, 1910, and that the valuation list in force on October 1 was therefore the supplemental list as altered by the provisional list.

1912. Nov. 4, 5. *Balfour Browne, K.C.*, and *Romer, K.C.* (with them *J. Goodland*), for the appellants. By the Metropolitan Water Board (Charges) Act, 1907, s. 8, the water rate (which is payable quarterly in advance) is calculated on the basis of the rateable value of the premises supplied, and by s. 13 the rateable value "for the purposes of this Act" is to be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues. What that list is must be ascertained by reference to the Valuation (Metropolis) Act, 1869, ss. 43—47. The question on this appeal is whether on October 1, 1910, when the water rate in respect of the premises in the respondent's occupation for the quarter commencing on that day became payable, the valuation list in force was the supplemental or the provisional valuation list. The submission of the appellants is that on that day the only valuation list in force was the supplemental valuation list, inasmuch as the provisional list was not settled by the assessment committee until October 3 and no valuation list can come into force until it is complete. The whole difficulty arises from sub-s. 8 of s. 47 of the Act of 1869, which

is said to give a retrospective operation to the provisional list. But the provisional list has no retrospective operation for the purpose of fixing a water rate payable in advance at the commencement of the quarter, first, because a water rate is not a rate within the meaning of the Valuation Act, but is a charge for a commodity, and, secondly, because neither the Charges Act nor the Valuation Act contains any provision for the adjustment of amounts overpaid or underpaid such as would be necessary if the charge were altered at a date subsequent to the date of the commencement of the quarter when the charge became payable.

Ryde, K.C., and *Konstam*, for the respondent. The machinery of the Valuation (Metropolis) Act, 1869, applies to a water rate as if it were a rate which was included in the Act. By sub-s. 8 of s. 47 of that Act the provisional list "shall have operation" from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, which in this case took place on June 23, 1910. The words "shall have operation" mean "shall come into force," as is shewn by the subsequent part of the sub-section, which says that the list "shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." Then sub-s. 10 says that "a provisional list during the time it is in force shall be deemed to form part of the valuation list for the time being in force." The date on which a provisional list is altered by the assessment committee does not affect the date on which the provisional list becomes part of the valuation list in force. The words "the valuation list in force at the commencement of the quarter" in s. 13 of the Charges Act are words of art to be construed according to the meaning which they bear in the Valuation Act, and mean whatever valuation list shall be ultimately decided to be in force at that date. On October 1 1910, the supplemental list was in force subject to the provisional list, which, when settled, related back to June 23, 1910. It is not an objection to the construction contended for by the respondent that the water rate is payable in advance, for the poor rate is enforceable as soon as it is made and published, and before the time has expired for which the rate is made: Nolan on the Poor Laws, 4th ed., vol. i., p. 258; and the fixing of the

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quantum of liability always follows the liability itself. No doubt on October 1, 1910, the respondent was bound to pay on the basis of the higher rateable value, but that would not prejudice his right to be allowed the amount overpaid. [They also referred to the Waterworks Clauses Act, 1847, ss. 68 and 70; the Water Rate Definition Act, 1885, s. 1; *Rex v. Barrat* (1), and *Reg. v. Handsley*. (2)]

Balfour Browne, K.C., in reply, referred to *Parrish v. Hackney Corporation*. (3)

The House took time for consideration.

Nov. 18. VISCOUNT HALDANE L.C. My Lords, the question before the House is what is the rateable value on which the water rate of licensed premises known as the "Brown Bear" in Aldersgate Street in the City ought to have been calculated for the quarter from October 1 to December 31, 1910.

Under the combined operation of the Waterworks Clauses Act, 1847, and the Metropolitan Water Board (Charges) Act, 1907, the water rate is payable in advance by equal quarterly payments, and a payment became due on October 1, 1910. By s. 13, sub-s. 1, of the second of these statutes it is provided that the rateable value of a house or building is, for the purposes of the statute, to be "determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor."

My Lords, the appeal therefore turns on a single point: What was the rateable value as stated in the valuation list in force on October 1, 1910? In the year 1908 the valuation list then in force in the parish of the city of London was altered in accordance with the provisions of the Valuation (Metropolis) Act, 1869, by the making of a supplemental valuation list, in which the rateable value of the "Brown Bear" was shewn as 400*l.*, and this list came into force on April 6, 1909. On June 2, 1910, the overseers of the parish sent to the assessment committee, in

(1) (1780) 2 Doug. 465.

(2) (1881) 7 Q. B. D. 398.

(3) [1912] 1 K. B. 669.

accordance with the provisions of s. 47 of the Act last mentioned, a provisional list in which the "Brown Bear" was included at the reduced rateable value of 399*l*. On June 23 the clerk of the assessment committee served on the respondent as occupier a copy of so much of the list as related to his premises, along with a notice specifying the time within which objection might be made. In the result the assessment committee considered the provisional list, and on October 3 reduced the rateable value to 234*l*., thereafter returning the list and a copy of it dated on that day and signed by their clerk in accordance with the provisions of s. 47.

My Lords, on these facts it appears to me that the amount shewn in the valuation list in force on October 1, the crucial date under s. 13 of the Charges Act, was 400*l*. as contended by the appellants, and not 234*l*. as contended by the respondent. *Prima facie* this is obviously so, but the learned counsel for the respondent have referred us to other sections of the Act of 1869 under which they say that what was done by the assessment committee on October 3 must be taken to have been operative retrospectively so as to make the valuation in force on the 1st of that month 234*l*. in contemplation of law. The majority of the Court of Appeal, consisting of Farwell and Kennedy L.JJ., have taken this view, while the Master of the Rolls, who dissented, and Parker J., who tried the case, thought otherwise.

The argument for the conclusion of the majority in the Court of Appeal turns on the construction of the Act of 1869, to which I have already referred. Under the provisions of this Act the valuation list may assume any one of three forms. It may be the original valuation list as approved by the assessment committee, and if so it lasts for five years unless altered by a supplemental or provisional list. So long as it is in force it is conclusive as to gross and rateable value, and determines the value not only for the purposes of certain specified rates and taxes, but for the purposes of the Acts relating to the qualifications of jurors and vestrymen, matters as to which it is not, as I may observe in passing, reasonable to suppose that the Legislature intended trials of causes and elections to be imperilled by a possible retrospective alteration of a qualification. As to the

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tax in respect of which the valuation list is conclusive, and which are made or charged after the provisional list comes into force, and the proportion of the current rate made or charged as above, are to be levied accordingly. And if on the next revision the list as altered contains a smaller value for a hereditament than that in the provisional list the amount overpaid in consequence of the larger value having been stated is to be refunded.

I now turn to the question how the sections I have referred to have to be construed for the purposes of what we have to decide. My Lords, the cardinal fact appears to me to be that after the passing of the Act of 1869 the Legislature, by the Charges Act of 1907, laid down a new and simple rule for the ascertainment of the rateable value on which the water rate, due in advance at the commencement of each quarter, was to be paid. The value was to be determined by the valuation list in force at the commencement of the quarter, that is, in the present case, on October 1. Now it is quite clear that when that day arrived there was no other list than the supplemental list in force, because the provisional list was not signed under sub-s. 8 until the 3rd. The money ought, therefore, to have been paid on the 1st, and if it was paid there is no provision for paying it back if the list was subsequently altered. Unless, therefore, there is some clearly expressed intention of the Legislature to take back at a subsequent date the right which had accrued to the appellants on October 1, that right must prevail.

Now I find no such clearly expressed intention. Sub-s. 8 is in my view ill-drawn and obscure. If it refers to sub-s. 3 the wording does not fit, for in sub-s. 8 the reference is to service on the occupier of a copy of the list, whereas under sub-s. 3 the copy is only to be of so much of the list as refers to his hereditament. It may be that the draftsman had in his mind that he was providing for a service of the final and signed list and of a new notice. If so, he failed to do this. Conceivably such a provision might be implied. But I do not think it necessary to consider this in the present case; for, assuming that sub-s. 8 has by virtue of a reference to sub-s. 3 and to the events which occurred under it on June 23 some retrospective operation, I find no expression clear enough to take away the title conferred

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on the appellants by s. 13 of the Act of 1907 or to make them refund the amount of the rate which on October 1 they became entitled to receive. In whatever sense the provisional list may subsequently have become operative it is at least quite clear that it was not "in force" on October 1. Even for certain purposes specified in the Act of 1869 itself I think that the existing valuation of 400% was conclusively in force on that date; for I am unable to conceive that the Legislature intended to repeal by s. 47 the definite enactment of s. 45 that the valuation list in force for any particular date was to settle conclusively the qualification of a juror or a vestryman.

A contrary conclusion leads to what would be little, if at all, short of an absurdity. It is therefore to my mind plain that even if the provision in sub-s. 8 as to the signed list having operation can be read retrospectively, so as to make this operation retrospective to the events of June 23, this retrospective operation can only be for purposes, whatever they may be, which do not extend to the destruction of the already ascertained qualifications of jurors or vestrymen, and is not equivalent to a complete "being in force" retrospectively. I am aware that in sub-s. 8 the expression "continue in force until the first list" follows the words to which I have referred. But the use of these words does not in my opinion carry the matter any further, or affect the qualified meaning which is all that I can attach to the words "shall have operation." To find a consistent explanation of the choice by the draftsman of the language he has used in the sub-section is impossible, and I see no reason why we should feel any obligation to make the attempt. It is sufficient if we can arrive at the negative conclusion that the words are insufficient to bring the new valuation into force retrospectively, with the consequences I have indicated.

I cannot agree with the reasoning of Kennedy L.J. that because the state of matters as regards the valuation list was on October 1 in a sense sub judice, therefore the existing valuation was not in force. For even assuming that this valuation was not in force, by the concluding words of s. 13, sub-s. 1, the last poor rate or other rate in which the poor rate is included is to be the determining standard, and not the

unsettled provisional list. Nor am I impressed by the argument from hardship. The assessment committee might have increased instead of, as they did, diminishing the valuation, and in that case there would have been actual advantage to the respondent.

My Lords, for the reasons I have given I have arrived at the conclusion that the view taken of these sections by the Master of the Rolls and by Parker J. was the true one, and that the appeal must be allowed with costs here and below. I move accordingly.

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LORD ATKINSON. My Lords, I concur. The question for decision on this appeal resolves itself into this: What, in the circumstances of this case, was the valuation list which answers the description of "the valuation list in force" on October 1, 1910 (the quarter day upon which the water charge sued for became due), within the meaning of the 13th section of the Metropolitan Water Board (Charges) Act, 1907. It is not disputed that these water charges are payable quarterly in advance on January 1, April 1, July 1, and October 1 in each year. They are to amount to a certain percentage, not exceeding 5 per cent., on the rateable value of the hereditament supplied with water. The rateable value thus becomes the measure of the charge, and that rateable value is, in the ordinary case, determined by what appears in the valuation list in force at the commencement of the quarter for which the water charge accrues. If no such list be then in force, the rateable value is determined by the last made rate for the relief of the poor, or other rate in which such last made rate is included. There is no statement in this case as to what this latter rate was.

In order to determine the question raised for decision it is necessary to examine the 43rd and the four succeeding sections of the Valuation (Metropolis) Act, 1869, and to construe the confused, obscure, and ill-drafted provisions of some of the sub-sections of the last of these, namely, s. 47.

Three distinct and different kinds of valuation lists are dealt with in these sections—(1.) the quinquennial list; (2.) the supplemental list; and (3) the provisional list. The first of these is the most permanent. It comes into force at the beginning of the

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year, commencing on the 6th of April immediately after it has been made, and lasts for five years. It may be altered in three different ways during its currency : (1.) on appeal to the assessment sessions or to a superior Court ; (2.) by the making of a supplemental list ; and (3.) by the making of a provisional list ; but it is not superseded by either of these latter lists. It may be altered by them, but as altered it endures for the stated period. That, I think, is clear on the construction of these sections. If an appeal against any of the valuations contained in this quinquennial list be pending at the commencement of the above-mentioned year the list comes into force in its unaltered form, and levies must be made in accordance with it. Provisions are, however, introduced to the effect that should, on such appeal, an alteration be made in this list, which alters the amount of the contribution, rate, or tax levied according to it, the difference, if too much be levied, shall be repaid or allowed, and if too little, shall be treated and recovered as arrears. The list for the time being in force is deemed to have been duly made in accordance with the Act, and is conclusive of the rateable value of the hereditaments comprised in it.

As this list lasts for five years, it was obviously necessary to make provision for its revision during its continuance in order to meet the cases of alterations in the rateable value of the hereditaments comprised in it. It is accordingly provided by s. 46 that during each of the first four years of its life a supplemental list shall, if necessary, be made out in the same form as the valuation list, shewing all the alterations which have taken place during the preceding twelve months in any of the matters stated. This supplemental list, however, is not a reproduction of the valuation list, since it only applies to those hereditaments which are affected by the alterations in value. It comes into force on the 6th of April after it has been made, and lasts for one year. It is not disputed that under sub-s. 3 of this section the provisions touching appeals against the valuations contained in the quinquennial list are made applicable to those contained in this supplemental list.

In the present case the valuation list in force in the parish of the city of London in the year 1908 was altered by a supplemental list which came into force on April 6, 1909, in which the

hereditaments with which this case is conversant, namely, the "Brown Bear" licensed premises, 79, Aldersgate Street, in the parish of the city of London, were valued at 400*l*. That valuation was never altered on appeal, or by any subsequent supplemental list. And the appellants contend that the quinquennial list so altered, in which this value of 400*l*. appeared, is the valuation list which was, within the meaning of this 13th section of this Act of 1907, in force on October 1, 1910, the commencement of the quarter, and that the water charges which the occupier of the "Brown Bear" was bound to pay on that date are to be measured by that valuation.

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The respondent on the other hand contends that this is not so; that this valuation of 400*l*. was reduced to 234*l*. by a certain provisional list, and that the list in force on October 1, 1910, within the meaning of the Act of 1907, was the quinquennial list varied, as to this hereditament, by this provisional list. The provisional list is dealt with by s. 47. It is intended to meet those cases where the value of hereditaments is increased or diminished in the course of a year. The section provides that the overseers of the parish in which such hereditaments are situate *may* of their own motion, and on the requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of the union, *shall* send to the assessment committee a provisional list containing the gross and the rateable value as so increased or diminished. It is obvious, however, that this is not a provisional list in the true sense of the word at all. It is merely a list proposed by the overseers for the consideration of the body which has the sole right to fix and determine what the real and effective provisional list is to be, namely, the assessment committee. On the receipt of this proposed list, the clerk of the assessment committee is to put the matter in train to be considered and adjudicated upon by this tribunal. He is to serve a copy of the proposed list on the surveyor of taxes of the district, and is to serve upon the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament.

The occupier is not to be served with a copy of the list, but only with a copy of that item in it which concerns his own

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If no objection be made, or if made has been determined upon, the committee are to cause a copy to be made of the provisional list, with any alterations made in it by them, and return that list to the overseers after it has been dated and signed by their clerk, together with a copy of it.

In the present case the list proposed by the overseers differed widely in reference to the "Brown Bear" from that dated and signed by the clerk of the assessment committee. In the former, which was sent to the assessment committee on June 2, 1910, the rateable value of this respondent's hereditament was stated to be 399*l*. In the latter, which was dated and signed by the clerk of the assessment committee on October 3, 1910, the rateable value was fixed at 234*l*. On June 23, 1910, the clerk of the commissioners served upon the occupier of the "Brown Bear" a copy of so much of the proposed list as affected that hereditament.

It is not stated in the case that he ever served upon this occupier the notice mentioned in sub-s. 3 of s. 47, specifying the date when the objections should be lodged. Now the contention of the respondent is that, by force of the provisions of sub-s. 8 of this 47th section, this list, the final form of which was only definitely fixed on October 3, 1910, came into operation, not on that day, nor yet on June 2, 1910, when the proposed provisional list was forwarded to the clerk of the assessment

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committee, which might be supposed to be the commencement of the controversy between the overseers and the occupier, but on June 23, when the copy of the item affecting this hereditament was served upon its occupier; and that by consequence the valuation list, as amended by the adjudication of October 3, was, within the meaning of s. 13 of the Act of 1907, "in force" by relation back, on June 23, and from thence onward to and inclusive of October 1, 1910. The words of the 8th sub-section, which appear to bring about this strange result, run as follows: "A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of the copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which subsequently comes into force."

Now it is admitted that the provisional list, signed as aforesaid, never came into existence as a final and authoritative document till October 3, 1910. It is a copy of that list so perfected that is to be sent to the overseers. One would naturally have expected, I think, that this list, or a copy of the item on it dealing with the "Brown Bear," should be sent to the occupier of the "Brown Bear," together with a notice to the effect that the valuation of his premises had been altered to the sum mentioned in it, and that this list would, as regards the "Brown Bear," come into operation on the date of the service of this copy with the accompanying notice upon the occupier. According to the respondent's contention, nothing so rational as this is permitted by sub-s. 8. Though the "list" in the first line of the sub-section necessarily means the true provisional list, authenticated by the signature of the clerk, the word "list" in the third line of the sub-section means, it is insisted, a wholly different thing, namely, the proposed list submitted by the overseers to the assessment committee for their adjudication. And the notice mentioned in line 3 of sub-s. 8 means the notice to be served under sub-s. 3 upon the occupier, specifying the date before which objection to the proposed list must be lodged. Retrospective action is thus given to the signed and dated list, the true provisional list, and it is argued that it had operation over four months before it ever came into existence.

The punctum temporis from which it has operated is thus the

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date of a mere step in the course of the proceedings, namely, the service of the notice fixing a date for lodging objections. I have listened in vain for any rational explanation of the selection of this date. That, however, is not all. The words of sub-s. 8 are "from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier." That is the only provision in s. 47 that refers to the service of any list upon the occupier. Sub-s. 3 directs nothing of that kind. It merely requires the service on the occupier of a copy of so much of the proposed list as relates to his own hereditament. The proposed list may relate, and probably in practice does relate, to many hereditaments. And, speaking for myself, I must say I see no justification whatever for doing such violence to the language of sub-s. 8 as is, I think, involved in holding that the word "list" occurring in its third line means merely a copy of the item in the proposed list relating to the "Brown Bear" directed by sub-s. 3 to be served upon the occupier. The absence of any provision such as is found in s. 44 and s. 47, sub-s. 10, in reference to appeals requiring the refunding to the occupier of any excess he may have been charged, and compelling him to pay up if he has been charged too little, affords, in my judgment, no such justification. The provisional lists are comparatively transitory things, and the ratepayers as a body are left to take the benefit or bear the burden of the changes in the valuation of the hereditaments with which the list deals. In my opinion the "list" mentioned in the first line of sub-s. 8 is the same document as the "list" mentioned in the third line, and the procedure intended to be provided was, I think, this: That a copy of this revised list should be served upon the occupier, together with a notice informing him what it was, and that he should be bound by it. That, at all events, would be a rational procedure. The muddled drafting of the sub-section unfortunately leaves the matter obscure.

If these provisional lists are to relate back in the manner contended for, then the certainty evidently aimed at by the 13th section of the Act of 1907 would in many cases disappear. Any ratepayer of the union can compel the overseers of the parish in which his hereditament is situated to send a proposed provisional

list to the assessment committee. The moment the clerk of this body furnishes the copy and notice prescribed, the valuation list which otherwise would have been in force is undermined. It is no longer "indefeasibly and unalterably in force," to use the words of Farwell L.J. The water charge cannot be measured by it with certainty, and must be measured, if measured at all, by "the last rate made for the relief of the poor or other rate in which such last mentioned rate is included." Yet, as I understood Mr. Ryde's argument, he admitted that the respondent was bound to pay on October 1 his water charge on the basis of the valuation appearing in this threatened valuation list. But that could only be if it were in force on the quarter day. It is in my view erroneous to put the construction contended for on the clear and definite language of the 13th section. For the purpose of that statute, it makes the valuation list actually in force on quarter day, whether threatened with variation or not, decisive of the rateable value of the hereditament to which water is to be supplied. So far from anything being found in the statute of 1869 to suggest that a provisional list should, in cases not actually specified in the statute, have the retrospective operation contended for, the special provisions of sub-ss. 9 and 10 of s. 47 suggest, I think, the contrary.

Sub-s. 9 is confined to the case of the poor rate. It provides that when the provisional list comes into operation the overseers shall bring the rate-book into conformity with it, but it gives to the overseers the power themselves to fix the date at which the list is to come into operation for the purpose of adjusting the charge upon the ratepayer. The overseers are to make their adjustment, having regard to the date so fixed by themselves, and the ratepayer is to be considered as rated at the new figure from this latter date, and not from the date at which the list, for any other purpose, came into operation. Sub-s. 10 refers to rates and taxes—the charges under the Act of 1907 are neither rates nor taxes—and it only affects rates and taxes made or charged after the provisional list comes into force. It provides for a refund in case on the next revision a value be placed on the hereditament lower than that put upon it in the provisional list, and only the proper proportion of the current rate is to be levied

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accordingly. The principle of relation back in all its breadth does not apply to either of the cases dealt with in these sub-sections. I think, on the contrary, their provisions tend to negative its application to them. I am further of opinion that outside the cases provided for in these sub-sections the provisional list has no retrospective action whatever, and that the list in force on October 1, 1910, within the meaning of s. 13 of the Act of 1907, was that in which the rateable value of the respondent's hereditament was stated to be 400*l*. Accordingly, I think that the judgment of Parker J. was right and should be affirmed, and the appeal allowed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the conclusions reached by your Lordships.

The water rate or charge under this Act is payable in advance. In my opinion at the beginning of each quarter it should be possible then to ascertain the amount or amounts payable. Both for the Board and for the person assessed this would appear to be in the line of business necessity. I think this also is the simple meaning of the words "in force." To introduce by implication, as is suggested in the judgment of the learned majority of the Court of Appeal, words so as to make the reference to a "list that can be regarded as indefeasibly and unalterably in force," is not to give the words "in force" their true and actual effect, but to introduce elements which would cause confusion and uncertainty into the relations of the authority and of the assessed, and to leave neither the one nor the other at the beginning of the quarter, the time when the payments have to be made, sure as to how their finances stand. In short, I agree with the learned Master of the Rolls, and I do not base my judgment on any further ground than that which I have ventured to state.

LORD MERSEY. My Lords, I have had the advantage of reading and considering the judgments delivered by the Lord Chancellor and Lord Atkinson, and I agree with them.

I do not propose to go through the various statutory provisions which are said to have a bearing on the question which your

Lordships have to decide. I propose only to state that question, and then to attempt shortly to deal with the answer given to it by the respondent. The question is, What was the valuation list in force within the meaning of s. 13 of the Metropolitan Water Board (Charges) Act, 1907, at the commencement of the quarter beginning October 1, 1910? It is admitted that the only list actually enforceable on that day, that is to say, the only list on which the occupier could have lawfully claimed to pay and the only list on which the Water Board could have lawfully exacted payment on that day, was the list in which the property was rated at 400*l*. But the respondent says that, though that is true, the list was changed by an event subsequent to October 1, namely, by a provisional list which came into being on October 3. This provisional list, he contends, had a retrospective operation dating back from October 3 to the previous June 23, the date on which he was served by the clerk of the assessment committee with a copy and notice of what this list was intended to be. In this proposed provisional list so served the valuation was reduced from 400*l*. to 234*l*.

In support of this contention, two provisions of the Valuation (Metropolis) Act, 1869, are mainly relied on. They are sub-ss. 8 and 10 of the 47th section. Sub-s. 8 provides that a provisional list shall have operation from the date of the service of a copy of the list and notice on the occupier; and sub-s. 10 provides that a provisional list during the time that it is "in force" shall be deemed to form part of the valuation list for the time being in force.

Taking the 10th sub-section first, it seems to me to be of no application in the present controversy. No provisional list was in force on October 1. The proposed provisional list had not come into legal existence on that date and could not, therefore, be in any sense "in force."

As to sub-s. 8, no doubt that provision for many purposes gave to the provisional list of October 3 an "operation" as from the date of the service, but not, in my opinion, for the purpose of affecting the rights of the Water Board under their Charges Act. The Charges Act was passed many years after the Valuation Act, and was, I think, meant to regulate water rates upon a list actually in existence on the first day of the quarter, and not upon

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such a list as amended or altered by some further list which might or might not come into operation in the future. If there had been some different intention, I should have expected to find such intention expressed. I agree with the Master of the Rolls where, in his judgment in the Court below, he says: "When it is remembered that the water rate is payable in advance on the first day of the quarter, it seems to me to follow that it must be possible on that day to ascertain the amount payable, and that it cannot be reasonably held that the obligation of the consumer depends upon the subsequent action of the assessment committee."

The two Lords Justices who decided in favour of the respondent appear to have been influenced by the hardship which it was thought a judgment in favour of the Water Board would inflict upon the respondent. But it is to be observed that the provisional list might have increased the valuation, in which event the respondent, if my view is right, would have benefited, for he could have insisted on paying on the lower valuation. But, in truth, I think that considerations of hardship cannot be allowed to enter into the decision of the case.

For these reasons, I think that sub-s. 8 affords no answer to the Water Board's demand. There was only one valuation list existing on October 1; on that valuation list the occupier and the Board had an equal right to stand; and, in my opinion, the right of the one to pay on that date and to claim a discharge and the right of the other to demand payment and to exercise their remedy in case of refusal to pay could not be affected by any subsequent event.

I think the judgment of the Court of Appeal should be set aside and the judgment of Parker J. restored with costs here and below.

Order of the Court of Appeal reversed and judgment of Parker J. restored: the respondent to pay the costs in the Courts below and of the appeal to this House.

Lords' Journals, November 18, 1912.

Solicitor for appellants: *Walter Moon.*

Solicitors for respondent: *Maitlands, Peckham & Co.*

[HOUSE OF LORDS.]

VACHER & SONS, LIMITED APPELLANTS; H. L. (E.)*
 AND 1912
 LONDON SOCIETY OF COMPOSITORS. RESPONDENTS. Nov. 18.

Trade Union—Action of Tort—Competency—Trade Disputes Act, 1906
 (6 *Edw. 7, c. 47*), s. 4, sub-s. 1.

Sect. 4, sub-s. 1, of the Trade Disputes Act, 1906, which provides that “an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court,” is general in its application and is not limited to tortious acts committed in contemplation or furtherance of a trade dispute; and any such action will be summarily dismissed upon an application under Order xxv., r. 4.

Decision of the Court of Appeal [1912] 3 K. B. 547, affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Channell J. in chambers. (1)

The appellants were general and parliamentary printers carrying on business at Westminster. The respondent society was a registered trade union. On July 28, 1911, the appellants commenced an action against the respondent society and two other defendants, Naylor and Holmes, who were respectively the secretary and the organizing secretary of the society, for damages for conspiracy to libel and for libel.

On January 27, 1912, the appellants delivered an amended statement of claim containing particulars of their complaints. (2)

The libels alleged in the amended statement of claim were contained (1.) in a new edition of a document entitled “The Compositors’ Fair List and Guide to the London Printing Offices,” from which the appellants’ name was omitted, and a covering letter enclosing the list, copies of which were sent by the defendant Naylor in December, 1909, to various customers of the appellants; (2.) in a letter, dated July 13, 1911, addressed by the

* *Present*: VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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- (1) [1912] 3 K. B. 547. claim is fully set out in the previous
 (2) The amended statement of report of the case.

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defendant Holmes to the United Committee of the Taxation of Land, who were customers of the appellants. The meaning of these documents, as alleged by the appellants, was that the appellants had been guilty of unfair dealings in their business, that they were in the habit of treating their employees harshly, that they never employed trade union compositors, and that they were not fit and proper persons to be entrusted with the execution of orders for printing.

On February 22, 1912, the respondents obtained from a Master an order that their name should be struck out of the writ of summons and all subsequent proceedings in the action upon the ground that under s. 4, sub-s. 1, of the Trade Disputes Act, 1906, the action was not competent as against them.

On February 26 this order was reversed by Channell J. in chambers, the learned judge being of opinion that this question was one which ought not to be decided summarily, but ought to be dealt with at the trial.

On April 3 the Court of Appeal (Vaughan Williams and Kennedy L.JJ., Farwell L.J. dissenting) rescinded the order of Channell J. and restored the order of the Master.

1912. Oct. 24, 25. *Danckwerts, K.C.*, and *Hugh Fraser*, for the appellants. The question is whether the effect of the Trade Disputes Act, 1906, is to confer on trade unions a general immunity in respect of actions of tort, as has been held by Vaughan Williams and Kennedy L.JJ., or applies only to acts done in contemplation or furtherance of a trade dispute, as has been held by Farwell L.J., and also by Darling J. in *Rickards v. Bartram*. (1) There may be a further question whether the immunity ought not to be confined to acts done within the scope of the objects of the trade union. There was here no trade dispute to which the tort could have related within the definition of that term in the Act as interpreted by this House in *Conway v. Wade*. (2) It was there held that an act is not done in furtherance of a trade dispute unless there is in fact a dispute imminent or existing. There can be no trade dispute where the only acts disclosed are unilateral. In *Taff Vale Ry. Co. v. Amalgamated*

(1) (1908) 25 Times L. R. 181.

(2) [1909] A. C. 506.

Society of Railway Serrants (1) this House, adopting the judgment of Farwell J., held that a registered trade union, though not a corporation, might for the purposes of being sued be treated as if it were a corporation and could be sued in its registered name. It was further held by Lord Lindley that the proper mode of enforcing a judgment against a trade union for the payment of money was by an action against the trustees under s. 9 of the Act of 1871. In that state of the law the Trade Disputes Act, 1906, was passed, and the question is how far the law has been altered by the Act. The object of that Act is to protect trade unions in connection with trade disputes. This appears from the title, which is a part of the Act and is material to be considered in determining the object of the Legislature: *Fielding v. Morley Corporation* (2); *Reg. v. Cockerton* (3); *Fenton v. J. Thorley & Co., Ltd.* (4) The title indicates the subject-matter to be dealt with. Here the short title is "The Trade Disputes Act, 1906," and the full title is "An Act to provide for the Regulation of Trades Unions and Trade Disputes," which is equivalent to "trades unions in respect of trade disputes." The scope of the Act further appears from the first three sections, in each of which are to be found the words "in contemplation or furtherance of a trade dispute," and also from sub-s. 2 of s. 4, where those words again occur. It is submitted that s. 4, sub-s. 1, is merely consequential upon the first three sections and that sub-s. 2 is a proviso upon sub-s. 1, and that the exception from sub-s. 1 with the exception grafted on that exception shews the true meaning of sub-s. 1, which is that the immunity thereby conferred relates only to tortious acts committed in contemplation or furtherance of a trade dispute. The exception referred to in sub-s. 2 of s. 4 must relate to the liability of the trustees to be sued for the purpose of making the property vested in them liable for the consequences of a tortious act committed by or on behalf of the trade union in contemplation or furtherance of a trade dispute, as where a judgment has been obtained against the trade union, for it is difficult to conceive in what other sense the trustees could be sued in respect of such tortious act, and, upon the

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(1) [1901] A. C. 426.

(2) [1899] 1 Ch. 1.

(3) [1901] 1 K. B. 726, at p. 731.

(4) [1903] A. C. 443, at p. 447.

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appellants' view of the Act, it follows that the immunity conferred by sub-s. 1 is co-extensive with sub-s. 2; otherwise, as Farwell L.J. points out, the exception is meaningless. Upon the appellants' construction the Act consistently carries out the object provided by the title. Further, it is inconceivable that the Legislature should have intended to place trade unions altogether above the law and to allow them to commit any kind of tort with impunity. Some limitation, as was admitted by Vaughan Williams L.J., must be placed upon the generality of the words of sub-s. 1 of s. 4 in order that a reasonable interpretation should be put upon the sub-section. Suppose a person was injured by the negligence of the servants of a trade union under circumstances which would render the employer liable, or suppose that premises in the occupation of a trade union had been allowed to get into disrepair and that as a consequence of that disrepair a brick had fallen from the building into the street and injured a passer-by, or that as such occupier the trade union committed a nuisance whereby a third party was injured. Can it be said that the trade union is under no liability to the injured party in any of those cases? Lastly, this is not a question which ought to be dealt with summarily under Order xxv., r. 4. That rule is more favourable to the pleading objected to than the old demurrer and only applies in a very clear case: *Republic of Peru v. Peruvian Guano Co.* (1); *Kellaway v. Bury* (2); *Attorney-General of the Duchy of Lancaster v. London and North Western Ry. Co.* (3); *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark.* (4)

Harold Morris (*Holman Gregory, K.C.*, with him), for the respondents. Sub-s. 1 of s. 4 ought to be given its ordinary and natural interpretation. The respondents desire to adopt the reasoning of Kennedy L.J. Before the decision in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (5) it was generally thought to be the law that a trade union could not be sued in its legal name because it was not a legal entity, and that case decided that it could be sued, but only by virtue of the Act of 1871. The trustees of a trade union were suable under s. 9 of the Act of

(1) (1887) 36 Ch. D. 489.

(3) [1892] 3 Ch. 274.

(2) (1892) 66 L. T. 599.

(4) [1899] 1 Q. B. 86.

(5) [1901] A. C. 426.

1871, but only for torts touching the property of the trade union, and in *Linaker v. Pilcher* (1), which was decided after the decision of the Court of Appeal in the *Taff Vale Case* (2) but before the reversal of that decision by the House of Lords, it was held that under s. 9 the trustees of a trade union who were the registered proprietors of a newspaper carried on by them not as a trading adventure but in the interest of the trade union could be sued for libel in their capacity of trustees. That is how the law stood when the Trade Disputes Act, 1906, was passed. The first three sections protect individuals. The 4th section protects trade unions and was intended, as Farwell L.J. says, to brush away the decision of the House of Lords in the *Taff Vale Case*. (3) The words of sub-s. 1 of that section in their ordinary signification are perfectly plain and unambiguous and mean that no action of tort of any kind can be brought against a trade union. As Fletcher Moulton L.J. said in *Osborne v. Amalgamated Society of Railway Servants* (4), this sub-section "frees trade unions from liability in all actions of tort." The argument of the appellants implies that you must read into this sub-section the words "in contemplation or furtherance of a trade dispute." Having regard to the decision in *Linaker v. Pilcher* (1), but for sub-s. 2, sub-s. 1 might be capable of being construed as being referable to the trustees, and sub-s. 2 was inserted to negative that construction and to define the limits of the trustees' liability. But assuming this view of the section to be wrong, sub-s. 2 deals with a wholly different subject-matter and cannot be read as limiting the effect of sub-s. 1. No limitation whatever should be put upon the sub-section. The term "trade union" is to be used in the Act in the sense in which the term is defined in the Trade Union Acts, 1871 and 1876, and adding the words "as such," as is suggested by Vaughan Williams L.J., carries the matter no further. No argument against the respondents' construction can be founded on the title of the Act, for the title does not bear the construction put upon it by the appellants.

Danckwerts, K.C., replied.

[The following cases were also referred to : *Bussy v. Amalgamated*

(1) (1901) 84 L. T. 421.

(2) [1901] 1 K. B. 170.

(3) [1901] A. C. 426.

(4) [1909] 1 Ch. 163, at p. 185.

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The House took time for consideration.

Nov. 18. VISCOUNT HALDANE L.C. My Lords, this appeal raises the question of the true construction to be put on s. 4 of the Trade Disputes Act, 1906. That Act was passed five years after the decision of this House in the case of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*. (4) It had been there decided that a trade union, registered under the Trade Union Acts, could be sued in its registered name, and also that a trade union, whether registered or not, could, since the Judicature Acts, be sued in a representative action at common law, if the persons selected as defendants were persons who from their position might fairly be taken to represent the union. It was pointed out by Lord Lindley that if a judgment so obtained was for the payment of damages it could be enforced only against the property of the union, and that to reach such property it might be necessary to make the trustees parties to any proceedings.

It is common knowledge that this decision gave rise to keen controversy as to whether the law required amendment. On the one hand it was contended that the principle laid down ought to remain undisturbed, because it simply imposed on the trade unions the legal liability for their actions which ought to accompany the immense powers which the Trade Union Acts had set them free to exercise. On the other side it was maintained that to impose such liability was to subject their funds, which were held for benevolent purposes as well as for those of industrial battles, to undue risk. It was said that by reason of the nature of their organization and their responsibility in law for the action of a multitude of individuals who would be held in law to be their agents, but over whom it was not possible for them to exercise adequate control, they were, by the decision of this House, exposed to perils which must cripple their usefulness.

(1) (1908) 24 Times L. R. 437.

(2) [1893] 1 Q. B. 435.

(3) [1901] A. C. 1.

(4) [1901] A. C. 426.

My Lords, we have heard, in the course of this case, suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of Parliament in the Trade Disputes Act of 1906, of presuming that the Legislature was acting with one or other of these points of view in its mind. For my own part, I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

The first question before us is whether a trade union, if it has committed a tortious act, such as a libel, can be sued for damages at all, even if the act is not committed in contemplation or in furtherance of a trade dispute. Before the Trade Disputes Act was passed it undoubtedly could have been so sued, and the question is whether Parliament has put an end to this liability.

The Act is confined to trade unions within the definition of the Trade Union Acts of 1871 and 1876. The title is "An Act to provide for the Regulation of Trades Unions and Trade Disputes." This appears to me to indicate that the scope of the statute was not confined to the regulation of trade disputes merely. Sect. 1 is confined to cases of trade disputes and amends the law of conspiracy in such cases by precluding legal remedy unless the act done would have been actionable apart from the circumstances of agreement or combination to do it.

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Sect. 2 is also confined to cases of trade disputes. It legalizes what is popularly called "peaceful picketing." Sect. 3 takes away the actionable character of any act done by a person in contemplation or furtherance of a trade dispute if the ground of action is only that what was done induced another person to break a contract of employment, or was an interference with the trade, business, or employment of another person, or with his right to dispose of his capital or his labour as he pleases. It will be observed that these three sections all relate to trade disputes, but that none of them relates exclusively to the case of a trade union. Sect. 4, sub-s. 1, the section which has to be construed in the present appeal, does, however, relate exclusively to the case of a trade union. It enacts that an action against such a union, whether of workmen or masters, or against any members or officials of the union on behalf of themselves and all the other members, in respect of any tortious act alleged to have been committed by or on behalf of the union, shall not be entertained by any Court. I draw attention to the fact that this section differs from the three preceding sections not only in relating exclusively to the case of a trade union, but in that sub-s. 1 omits mention of any restriction which would confine the tortious act to one in contemplation or in furtherance of a trade dispute. Upon this point it has been contended by the learned counsel who addressed the House for the appellants that such a restriction ought to be implied. It is said that s. 5, which provides that the Act may be cited as the Trade Disputes Act, 1906, and the scheme of the first three sections, which deal only with trade disputes, shew that the Act is to be interpreted as so confined, and that it cannot be supposed that the Legislature intended to free trade unions from liability to the extent which a literal reading of s. 4, sub-s. 1, would indicate.

My Lords, with this contention I am unable to agree. It is true that it is provided that the Act may be cited by the short title of the Trade Disputes Act, 1906. But the governing title is that which introduces the statute as an Act to provide for the regulation of trade unions and trade disputes. The first three sections regulate trade disputes. The 4th section appears to

me to carry out the other intention indicated by the initial title by laying down new law as to trade unions. I find no context in the Act read as a whole which indicates an intention to cut down the literal meaning of the wide language of s. 4, sub-s. 1. For reasons which I have already assigned, I think that it would not only be beyond the functions of a Court of justice to presume that the Legislature could not when it passed the Act have intended to go as far as the plain words used say, but that if judges could speculate as to its intentions they would probably speculate wrongly.

I pass, therefore, to the next point which was made for the appellants. This turns on the effect of sub-s. 2 of s. 4, a sub-section which, it is said, ought to be read as a proviso to sub-s. 1 restricting its operation. Sect. 4, sub-s. 2, is in these terms: "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute."

The Act of 1871 enables trade unions to register, and provides by s. 9 that the trustees of a registered trade union may sue or be sued as such in cases concerning the property of the trade union. The Legislature appears to have desired to draw a distinction between the union and its trustees and to preserve the liability of the trustees under this section, even in the case of tortious acts committed by the union, damages arising out of which might, as pointed out by Lord Lindley in his judgment in the *Taff Vale Case* (1), have been made effective against property in the hands of the trustees. But a restriction is put on the liability of the trustees by excepting from it liability in respect of a tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute. Having regard to the distinction drawn in the wording of the statute between the liability of the trade union and the liability of its trustees, I see no justification for importing the provision restricting liability enacted in the latter sub-section into the words of sub-s. 1, and I think that on the second point made the argument

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which was addressed to us to the effect that the words of exception in the 2nd sub-section must be read as qualifying the whole section cannot succeed.

I now turn to the facts out of which the questions of law which I have considered arose.

The action was one for damages for conspiracy and libel, brought by the appellants, whose business was that of printers, against the respondents, who were a trade union to which the Act of 1906 applied. It does not appear whether there were trustees of the union or whether there was property vested in them which could have been made liable, assuming the cause of action did not arise out of a trade dispute. If there were trustees they were not made defendants, and, indeed, if the advisers of the plaintiffs were apprehensive that the trial might disclose a trade dispute, it is obvious that there were good reasons for not joining the trustees. A statement of claim was delivered which set out particulars of the conspiracy and libel, the gist of which was that the respondents had conspired to represent and had untruly represented the appellants as a firm that dealt unfairly by their workmen. Without delivering a statement of defence the respondents applied to strike the name of the respondent society from the action on the ground that in the first place a trade union could not be sued at all in such an action, and that, in the second place, even if s. 4, sub-s. 1, of the Trade Disputes Act of 1906 was to be read as applying only if there was a trade dispute, it appeared on the face of the proceedings that the acts complained of had arisen out of such a trade dispute. Master Wilberforce made an order allowing the application. Channell J. on appeal discharged this order, and directed that the point should not be disposed of summarily, but should stand to the trial. The Court of Appeal by a majority reversed the order of Channell J. and restored the order of Master Wilberforce. Vaughan Williams L.J. thought that the libel, even according to the bare description in the statement of claim, was, on the face of it, an act done in contemplation or furtherance of a trade dispute. I entertain so much doubt on this point, that if it were the only one that arose I should be of the opinion of Channell J. that the application ought to stand over to the trial in order

that facts might be ascertained which would enable the Court to decide whether it had jurisdiction to entertain the action. But Vaughan Williams L.J. decided in favour of the appeal before him on the other point. He took the view which I take, that sub-s. 2 of s. 4 cannot be read as qualifying the prohibition of the Courts contained in sub-s. 1. Farwell L.J. took a different view and dissented, and Kennedy L.J. held that the plain language of sub-s. 1 could not be cut down except by indulgence in illegitimate speculation as to what the Legislature must have intended. On the other point he found himself unable to agree with Vaughan Williams L.J.

My Lords, I am in complete agreement with the judgment delivered by Kennedy L.J. The reasons I have stated in examining the Act and its various sections have led me to the same conclusions as he has reached. I therefore move that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, the point raised by this appeal is a very short one and, in my opinion, absolutely clear. If I had not had the pleasure of listening to a most ingenious argument on the part of the appellants, I should not have thought the question arguable here or anywhere else in the world.

The Trade Disputes Act, 1906, declares that "An action against a trade union, . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." The language of the enactment is precise and unambiguous. No one can doubt what the words mean.

Now it is "the universal rule," as Lord Wensleydale observed in *Grey v. Pearson* (1), that in construing statutes, as in construing all other written instruments, "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

Acts of Parliament are, of course, to be construed "according

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(1) (1857) 6 H. L. C. 61, at p. 106.

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to the intent of the Parliament" which passes them. That is "the only rule," said Tindal C.J., delivering the opinion of the judges who advised this House, in the *Sussex Peerage Case*.<sup>(1)</sup> But his Lordship was careful to add this note of warning: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." Nowadays, when it is a rare thing to find a preamble in any public general statute, the field of inquiry is even narrower than it was in former times. In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shewn either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed.

Now there is nothing absurd in the notion of an association or body enjoying immunity from actions at law. Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It was not contended that there is any inconsistency in the Trade Disputes Act, or any conflict between any of its clauses. On the contrary, the argument rather was that it was consistent throughout; so consistent and so clear that the omission of words otherwise perhaps material made no difference. No words, it was said, were to be supplied; there was no room even for implication. Sect. 4 was merely consequential on the sections

(1) (1844) 11 Cl. & F. 85, at p. 143,

which preceded it. Throughout the statute from first to last the only case which Parliament was contemplating was the case where the tortious act complained of is done in furtherance or in contemplation of a trade dispute. It was said that this was plain from the preceding sections, and that sub-s. 2 of s. 4 made it plainer still.

There is some difficulty in grasping an argument so ingenious and so subtle. I agree with Mr. Morris, who put the case for the respondents very well. The appellants must fail unless the words "in contemplation or furtherance of a trade dispute" are introduced into sub-s. 1 of s. 4, by construction or implication or some process of thought-reading which I confess I am unable to follow.

Sect. 4 is not, I think, consequential on the preceding sections in the sense in which the learned counsel for the appellants used the word "consequential." Sect. 4 seems to me to deal with a different subject and a different Act of Parliament. The first three sections are concerned with the Conspiracy and Protection of Property Act, 1875. The first two sections in terms refer to that Act. Sect. 3, though not mentioning the Act in terms, affects the Act and amends it by making the act of "a person," in inducing a breach of contract, or in doing certain other things, which would have been actionable before the Trade Disputes Act, 1906, actionable no longer if done in contemplation or furtherance of a trade dispute. Sect. 4 is not directed to the Conspiracy and Protection of Property Act, 1875. In both its sub-sections it is directed to the Trade Union Act, 1871. Everybody knows that sub-s. 1 was introduced in order to neutralize the effect of the decision in the *Taff Vale Case* (1) by an extension of the Trade Union Act, 1871.

It is not easy to see the object of sub-s. 2 of s. 4 or to understand its precise meaning. It seems to me, therefore, that it will be better to leave the construction of that sub-section to be determined when it comes directly in question, if ever that occasion should occur. However it may be construed it cannot, I think, affect the plain meaning of sub-s. 1, or assist the appellants in any way.

(1) [1901] A. C. 426.

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I am of opinion that the action as against the trade union was incompetent and that the appeal should be dismissed with costs.

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LORD ATKINSON. My Lords, the sole question for decision in this case is, in my view, the proper construction of the first sub-section of s. 4 of the Trade Disputes Act, 1906. It has already been quoted. The law upon the subject of the liability of a trade union to be sued in tort at the time this statute was passed was, I think, this: Under the decisions in the cases of *Duke of Bedford v. Ellis* (1) and the *Taff Vale Case* (2) it must, I think, be taken (1.) that a trade union, registered or unregistered, could be sued in respect of torts committed by its agents in a representative action, provided the selected defendants were fairly representative of it; (2.) that a registered society might be sued in its registered name; and (3.) that if the trustees were made defendants in such actions, an order could be made by the Court binding on them for the payment by them of the damages and costs recovered, out of the funds of the society in their hands. Lord Lindley lays down this last proposition in so many words at p. 443 of *The Taff Vale Case*. (2) So that it is not at all necessary that, judgment being recovered against the union in either of such actions, a second action, founded on that judgment, should be brought against the trustees to recover the amount of the damages and costs which the judgment had converted into a specialty debt. Equitable execution against the property of the union held by the trustees could be obtained in the original suit, if they were made parties to it.

In s. 4, sub-s. 1, of the Act of 1906 the representative form of action is expressly named in so many words, and it is enacted that an action of that kind brought in respect of any tort alleged to have been committed by or on behalf of the trade union shall not be entertained. The sub-section further provides that any action for a similar tort shall not be brought against the trade union. Thus both these modes of proceeding to obtain redress for the tortious act mentioned are in plain and unambiguous language prohibited. Such actions, it says, "shall not be entertained by any Court." Now Mr. Danckwerts, in his able argument,

(1) [1901] A. C. 1.

(2) [1901] A. C. 426.

insisted that this wide and positive prohibition must be cut down and limited in its scope to cases in which the action is brought in respect of a tort committed by or on behalf of a trade union "in contemplation or furtherance of a trade dispute," and that a trade union should be held to remain as liable as it was before this statute was passed for all torts committed by it or on its behalf which were not committed "in contemplation or furtherance of a trade dispute." He bases his argument, as I understand him, upon two grounds: firstly, upon the consideration of the evil results which would follow from the wider construction, since it would, he says, raise trade unions above the law, and enable them to commit torts of all kinds with impunity; and, secondly, on the ground that s. 4, sub-s. 1, is merely consequential upon ss. 1, 2, and 3, and that when taken in connection with these latter, it is necessary to limit sub-s. 1 to the extent he contended for, in order to bring it into harmony with the provisions of those earlier sections as well as with those of the 2nd sub-section of this section.

It is no doubt well established that, in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them. But, as Lord Halsbury laid down in *Cooke v. Charles A. Vogeler Co.* (1), a Court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not

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(1) [1901] A. C. 102, at p. 107.

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Lord Esher in *Reg. v. The Judge of the City of London Court* (1) states the principle thus: "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity. In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation." So that if in this case the words in this section are plain and are not controlled by other portions of the statute, the contention that to interpret them according to their natural and ordinary meaning would result in placing trade unions above the law is, for the purposes of the judicial decision of this case, entirely irrelevant. We have nothing to do with it. I think the language is plain, and therefore abstain from expressing any opinion on the character of the enactment or the results it will bring about.

Next, as to the contention that s. 4, sub-s. 1, is only consequential on the three preceding sections. The 1st section simply aims at assimilating the civil and criminal law in respect of the particular kind of conspiracy mentioned in the section. The 3rd section of the Act of 1875 provided that an agreement or combination of two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen should not be indictable as a criminal conspiracy, if the act when committed by one person would not be a crime. It thus struck, in the particular instance mentioned, at the principle of the criminal law of conspiracy to the effect that it is the "agreement or combination" which is the essence of the crime, and that, therefore, a combination or agreement to do, or procure to be done, something not in its own nature criminal if done by one person, might still be a crime.

In order to establish civil liability for a conspiracy "agreement

(1) [1892] 1 Q. B. 273, at p. 290.

or combination" per se is not enough. It must be followed by damage. Damage can only be caused by some act, including in the word "act," of course, the use of threatening words, or the writing and publishing or speaking and publishing defamatory words, or such like. And it was, therefore, only necessary, in order to protect from civil liability in this kind of case, to provide, as has been provided in s. 1 of the Act of 1906, that "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." The words apply to all persons whether members of trade unions or not, and to combinations between such persons.

As to the 2nd section of the Act of 1906, the Act of 1875, by s. 7, made "watching and besetting" of the kind therein described criminal, but in its last paragraph limited the scope of the section by enacting that the action which would amount under its words to the crime of watching and besetting was not to be so treated if it was done merely to obtain or communicate information. The 2nd section of the Act of 1906 deals with civil as well as criminal responsibility. It makes the acts it describes lawful acts, and secures immunity not only for the attending to obtain or communicating information, but also for the attending for the purpose of persuading any person to work or abstain from working, provided always that these things are done, first, peaceably, and, secondly, in contemplation or furtherance of a trade dispute. But this section, like the preceding one, is not confined to trade unions or to the members of trade unions. It applies to one or more persons acting on his or their own behalf, or on behalf of a trade union, or of an individual employer or firm.

The members of trade unions who watch or beset in a manner which deprives them of the protection of this section are of course liable criminally or civilly according to the nature of the act done.

Sect. 3 of the Act of 1906 applies to all individuals. It is intended to encroach upon the law as laid down in *Quinn v. Leathem* (1), and the cases which preceded it; but, like

(1) [1901] A. C. 495.

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the earlier provisions, it applies to all persons whether members of a trade union or not. It is quite true that in each of these sections one of the necessary conditions to secure immunity is that the act should be done in contemplation or furtherance of a trade dispute. It is from that circumstance that the saving grace apparently flows, and I can fully appreciate the force of the argument by analogy pressed by Mr. Danckwerts, that trade unionists should not escape liability unless they bring themselves within its absolving influence. That argument would have much more force if any consistent scheme or plan underlay this statute. But that is not so. Its 1st and 2nd sections merely introduce qualifying provisions into two sections of an existing statute, and its 3rd section is designed merely to modify, by the same qualification, the law laid down in several cases. No reason can, I think, be suggested why the Legislature should not have expressly qualified the immunity conferred upon trade unions by s. 4, sub-s. 1, in the manner suggested, if they desired or intended so to do. They have used plain, clear, and unambiguous language to confer this immunity, and I do not at all think that it is necessary to qualify that language to bring the provisions of the sub-section into harmony with the provisions of the sections which have preceded it.

There remains for consideration the 2nd sub-section of s. 4. Mr. Danckwerts relied strongly upon this sub-section in support of his contention. The qualification common to the 1st, 2nd, and 3rd sections is here introduced to qualify to that extent the statutory liability imposed upon the trustees (who may not be members of the union at all) by the 9th section of the Act of 1871, and he urged that the use of the words "nothing in this section" with which the sub-section commences shews that the Legislature thought and intended that the words "in contemplation or furtherance of a trade dispute" should be taken as by implication introduced into the 1st sub-section. I think, however, it is clear what the meaning and object of the sub-section really is. A proceeding against the trustees under s. 9 of the Act of 1871 is in fact, if not in form, a proceeding in rem against the property of the trade union. In that sense it is an action against the union itself. Judgments for damages against a trade

union for torts committed by its agent, in whatever form the action might be brought, can only be satisfied out of the property vested in the trustees; and it was, I think, apprehended by the Legislature that the wide and positive provisions of sub-s. 1 might be taken as practically repealing in part s. 9 of the Act of 1871, and thereby conferring on the trustees immunity as absolute as that conferred upon the union. This sub-section, while qualifying their liability to some extent by the introduction of the provisions common to ss. 1, 2, and 3, was, I think, passed for greater caution to meet this possible danger, and, save as to that qualification, to preserve unimpaired the liability imposed on the trustees by s. 9 of the Act of 1871.

In the view I take of the provisions of sub-s. 1 of s. 4, it is not necessary to determine whether any evidence of the existence of a trade dispute is disclosed in the statement of claim, or any evidence that the alleged libel was published in contemplation or furtherance of such a dispute. I wish, however, to point out that in a proceeding such as that adopted in this case, which is in truth somewhat of the nature of a demurrer to the statement of claim, the only facts which can be taken as admitted are those which are, expressly or impliedly, averred in the statement of claim itself. Inferences of fact must be drawn by the jury. And no Court can, for the purposes of such a proceeding as this, take as admitted a fact not averred, but which is, in truth, an inference from facts which are averred in the pleading.

In this statement of claim it is not averred, expressly or impliedly, that a trade dispute existed or was in contemplation. Neither is it averred that the act complained of was done in furtherance or contemplation of such a dispute. In my opinion, therefore, this case must be disposed of on the assumption that no trade dispute existed, or was in contemplation, and that this libel was not published in contemplation or furtherance of such a dispute. On the whole I am of opinion that the appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, by s. 4, sub-s. 1, of the Trade Disputes Act, 1906, it is provided that "an action

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against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."

It is conceded that this action—which is against a trade union in respect of a tort—is within the class of actions there set forth, if the words of the sub-section mean what they say. I think that the sub-section is neither self-contradictory nor repugnant to the other provisions of the Act, and that, as regards the words themselves, they are unambiguous, comprehensive, and imperative.

Were they ambiguous, other sections or sub-sections might have to be invoked to clear up their meaning; but being unambiguous, such a reference might distort that meaning and so produce error. And of course this is a fortiori the case, if a reference is suggested, not to something within, but to considerations extraneous to, the Act itself. If, for instance, it be argued that the mind of Parliament "looking before and after," having in view the past history of a question and the future consequences of its language, must have meant something different from what it said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down or even to vaporize it, but is a most dangerous exercise for any interpreter like a Court of law, whose duty is loyally to accept and plainly to expound the simple words employed. I therefore agree entirely with my noble and learned friend Lord Macnaghten in his view of this case.

The comprehensiveness is plain; the action which no Court is to entertain against a trade union is "in respect of any tortious act," &c. To limit this to tortious acts of a particular character or in respect of particular things, such as trade disputes, is to imply an addition to the language and to import a limit to the comprehensiveness of the section, and so pro tanto to defeat the statute.

Nor is the imperative doubtful. No Court is to entertain such an action. Apart altogether from the pleadings, it is *pars judicis* to stop the case whenever its true nature is revealed. To

entertain the action would be to disobey the Legislature, and would on the part of the judiciary constitute a usurpation. H. L. (E.)

I content myself with these propositions and do not enter into the details. I refrain for this reason, that these, together with what are, in my humble opinion, the proper conclusions to be derived therefrom, have been marshalled by Kennedy L.J. in a judgment to which I do not feel that I could usefully add.

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LORD MOULTON. My Lords, I concur. The only question raised by this appeal is, in my opinion, the proper construction of s. 4, sub-s. 1, of the Trade Disputes Act, 1906. If this be construed in the manner contended for by the respondents, it amounts to a statutory prohibition to all Courts against entertaining an action of tort against a trade union. This renders it obligatory upon the Court to stay such an action so soon as it is made aware of its existence. To allow it to come to trial would, in my opinion, be entertaining it. The statute so interpreted gives protection to trade unions against actions of tort not by furnishing them with a defence, but by giving them complete immunity against legal proceedings.

The words of the enactment are as follows: "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."

These words appear to me to be free from any ambiguity when taken apart from their context in the Act. At the date when the Act was passed it had been settled that trade unions could be sued in a representative action or, if they were registered trade unions, under their registered name, and the plain meaning of the enactment is that, however the trade union be sued, the Court shall not entertain the action if it is in respect of a tortious act alleged to have been committed by or on behalf of the trade union. But the appellants say that when the whole Act is considered it will appear that this is not the right construction, and that, on the contrary, the general language of the section must be limited by implication from other parts of the



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Act. It is, of course, a well-recognized principle in the interpretation of statutes, that a statute must be looked at as a whole, and I shall, therefore, as the point is of great importance, proceed to consider in detail the arguments urged on behalf of the appellants for thus restricting the meaning of the enactment.

The Act is entitled "An Act to provide for the Regulation of Trades Unions and Trade Disputes." It consists substantially of four enacting sections. The 1st section amends the law as to combination, the 2nd permits peaceful picketing, the 3rd amends the law by which it was actionable to persuade servants or workmen to break contracts of employment. There is a similarity in the objects of the three sections, inasmuch as they all operate to increase the immunity of the individual in respect of acts such as usually occur in connection with trade disputes. But the sections have nothing else in common. They are not parts of any integral scheme of legislation, but only amendments of specific points in the law as it then stood partly by reason of the common law and partly by reason of specific Acts of Parliament. I am satisfied that these sections do not, either individually or collectively, throw any light on the interpretation of the 4th section, which relates to a wholly different subject.

Counsel for the appellants would have us limit the generality of the words "any tortious act" in s. 4, sub-s. 1, by reading in, or implying, the limitation "in contemplation or furtherance of a trade dispute." He based his contention on three grounds: (1.) the title of the Act; (2.) the presence of these words in the 2nd sub-section of s. 4; and (3.) the argument *ab inconvenienti*. He further urged us to treat the clause as consequential upon the first three sections of the Act, and to interpret it accordingly, but with that contention I have already dealt.

The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. This is not the case with the short title, which in this instance is "The Trade Disputes Act, 1906." That is a title given to the Act solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate, in my

opinion, to use it for the purpose of ascertaining the scope of the Act. Its object is identification and not description. H. L. (E.)

The full title of the Act is, as I have said, "An Act to provide for the Regulation of Trades Unions and Trade Disputes." The appellants ask us to read this as though it were "for the regulation of trades unions as to trade disputes," and to treat the Act as though it related solely to trade disputes so that s. 4, sub-s. 1, must be read with that limitation. I can see nothing to justify such an extraordinary mode of construction of the Act. The title, as it stands, is not only intelligible but admirably describes the purposes of the Act. Sects. 1, 2, and 3 relate to trade disputes, without any special reference to trade unions, and s. 4 relates to trade unions, whichever of the two rival interpretations of the section be adopted. It is evident, therefore, that the title of the Act is amply accounted for, whatever be the view that the Court takes of the matter in dispute, and therefore it cannot assist us in deciding between the two proposed constructions.

The point next urged on behalf of the appellants is that s. 4 should be read as a whole, and the limitation, "in contemplation or furtherance of a trade dispute," should be treated as implied in sub-s. 1 because it is present in sub-s. 2. This contention appears to me to be directly contrary to the most elementary principles of the construction of statutes. To my mind, as a matter of construction, the fact that sub-s. 1 speaks of tortious acts generally, and sub-s. 2 speaks only of a certain class of tortious acts, creates a contrast between the two sub-sections which emphasizes the generality of the one and the limited character of the other. If there were any difficulty of grammatical construction or interpretation of the language of sub-s. 1, it might be necessary to consider whether, taking the section as a whole, there was not some interdependence of the one sub-section on the other. But, inasmuch as the language of sub-s. 1 is clear and unambiguous, this is not open to us. There are, no doubt, difficulties arising from the drafting of the section, and I shall presently consider them, but they arise exclusively in connection with sub-s. 2, and afford no aid to the contention of the appellants.

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Finally the argument *ab inconvenienti* is pressed upon us. It is urged that it is impossible to suppose that the Legislature could have intended to give so wide an immunity to trade unions as that which follows from taking the words of sub-s. 1 in their natural sense.

The argument *ab inconvenienti* is one which requires to be used with great caution. There is a danger that it may degrade into mere judicial criticism of the propriety of the acts of the Legislature. We have to interpret statutes according to the language used therein, and, though occasionally the respective consequences of two rival interpretations may guide us in our choice between them, it can only be where, taking the Act as a whole, and viewing it in connection with the existing state of the law at the time of the passing of the Act, we can satisfy ourselves that the words can have been used in the sense in which the argument points. There is nothing of the kind here. At the date of the Act the recognized state of the law was that a trade union could be sued in the same way as any other association by the procedure of a representative action, or—in case it was a registered trade union—under its registered name. That this was the state of the law had, no doubt, come as a surprise to large sections of the community. Even in the Courts themselves there had been a difference of opinion on the point, as is shewn by the history of the Taff Vale litigation. Under these circumstances the Trade Disputes Act, 1906, was passed and we find in it a plain provision, that no action shall be entertained against a trade union by either of the two methods of procedure by which, at that time, such an action could be brought, in case the action is in respect of a tortious act. Under such circumstances the Court is not justified in allowing itself to be influenced by the argument *ab inconvenienti*. The Legislature has plainly expressed its decision that such should be the law.

I am further of opinion that too much has been made of the supposed gravity of the consequences of the enactment. It will be seen that it does not affect the personal liability of any individual. Trade unions, just like all other associations, must act through agents, and it is a fundamental principle of English law that no tortfeasor can excuse himself from the consequences of his acts

by setting up that he was acting only as the agent of another. All that the section takes away is the power of proceeding against the association or making its corporate funds liable. The association, therefore, is in a position in some respects analogous to (though by no means identical with) the position of statutory corporations with regard to contractual acts which are *ultra vires*. No matter how completely the act may in form be an act of the corporation, it cannot be made liable under the contract, because it must act through agents, and it could give no authority to any one to do on its behalf an act that was *ultra vires*. Nor is such a provision of a wholly novel type in connection with trade unions. In s. 4 of the Trade Union Act, 1871, we find a list of legal proceedings which (although the associations had by that Act been made legal) the Courts were not on that account permitted to entertain. It is true that the Trade Disputes Act, 1906, makes an addition to the list which is of enormous importance, and does so in very peremptory language, but it cannot be said that, interpreted according to its plain language, it is of a type wholly without precedent in past trade legislation.

The real difficulty in the interpretation of s. 4 is to be found in the interpretation of sub-s. 2, which reads as follows: "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

The difficulty arises from the fact that there is nothing in sub-s. 1 of s. 4 which relates to suing the trustees of a trade union. It only refers to suing the officials of a trade union when they are sued in a representative action, and that is not what is referred to in sub-s. 2. One would be inclined to avoid the difficulty by saying that the sub-section was put in *ex abundanti cautela* only, were it not for the exception which it contains, which would seem to indicate that sub-s. 1 would otherwise have granted immunity to the trustees in respect of all actions for tort coming under s. 9 of the Act of 1871, and that it was the intention of the Legislature to limit that immunity to cases where the tort was

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H. L. (E.) committed by, or on behalf of, the union, in contemplation or in furtherance of a trade dispute. Whether this is, or is not, the true interpretation of the section as a whole is not before us in the present action, but I have thought it right to indicate the real difficulty which exists in its interpretation, and which, I think, points either to imperfect drafting or to some intermediate provision having been cut out without the proper consequential amendments being made in the language of sub-s. 2. But the difficulty, however great, has no bearing on the point before this House. The language of the section, so far as it relates to the present case, is clear and unambiguous, and, in my opinion, we must follow it.

I am, therefore, of opinion that the decision of the Court below was right on the lines adopted by Kennedy L.J. in his judgment, and that this appeal should be dismissed with costs.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

. *Lords' Journals*, November 18, 1912.

Solicitors for appellants: *Scatliffs*.

Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

[HOUSE OF LORDS.]

H L. (Sc.)\*

LORD PROVOST, MAGISTRATES, AND  
COUNCIL OF THE CITY OF EDIN-  
BURGH . . . . . } APPELLANTS ;

1912  
Oct. 29.

AND

BRITISH LINEN BANK . . . . . RESPONDENTS.

*Loan—Local Government—Burgh—Issue of Redeemable Stock by Municipal Corporation—"Redeemable"—Edinburgh Corporation Stock Act, 1894 (57 & 58 Vict. c. lvi.), s. 5—Edinburgh Improvement and Tramways Act, 1896 (59 & 60 Vict. c. cxxiv.), s. 83.*

By the Edinburgh Corporation Stock Act, 1894, the Corporation of Edinburgh, where they had any unexhausted statutory borrowing power, were authorized to exercise such power by the creation of redeemable stock, and by the Edinburgh Improvement and Tramways Act, 1896, the corporation, in addition to the powers contained in the Act of 1894, were authorized to create and issue a new class of stock to be "redeemable at the option of the corporation at one and the same period to be fixed by the corporation but not exceeding sixty years from the first issue of such stock." In pursuance of this power the corporation issued stock to be redeemable at par after the expiration of a period of thirty years from May 15, 1897:—

*Held*, that the corporation were not bound, on the application of the holders, to redeem the stock immediately on the expiration of that period, but had merely an option to do so.

Decision of the Extra Division of the Court of Session in Scotland, 1912 S. C. 139, reversed.

APPEAL from an interlocutor of the Extra Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary. (1)

The respondents were original holders of 254,000*l.* of Edinburgh Corporation 2½ per cent. stock issued by the appellants under the authority of the Edinburgh Corporation Stock Act, 1894 (57 & 58 Vict. c. lvi.), and the Edinburgh Improvement and Tramways Act, 1896 (59 & 60 Vict. c. cxxiv.).

\* *Present*: VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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The preamble of the Act of 1894 recited (among other things) that it was expedient "that the corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of corporation stock as in this Act provided."

Sect. 5 of that Act provided as follows:—

"(1.) Where the corporation have for the time being any statutory borrowing power then subject and according to the provisions of this Act the corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount within the limit of the power at such price . . . to bear such half-yearly or other dividends and to be so transferable . . . as the corporation by the resolution for the first creation of corporation stock direct Provided that all corporation stock at any time and from time to time so created shall be created on and subject to such terms and conditions as that the same shall form one and the same class of stock bearing one and the same rate of dividend and shall become redeemable as hereinafter provided after the expiration of one and the same period from the first creation of corporation stock."

"(3.) The resolution for the first creation of corporation stock shall provide that such stock shall be redeemable at the option of the corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock."

"(4.) Each resolution for creation of stock shall specify that the stock thereby created is redeemable."

Under the powers of that Act the appellants issued a 3 per cent. redeemable stock, with which this appeal is not concerned.

Sect. 83 of the Act of 1896 provided as follows:—

"The corporation in addition to the powers contained in the Edinburgh Corporation Stock Act 1894 may and they are hereby authorised at any time to create and issue a new class of stock for all or any of the purposes for which the corporation may create and issue stock to bear any rate of dividend which the corporation may fix and all stock of such class shall be redeemable at the option of the corporation at one and the same period to be fixed by the

corporation but not exceeding sixty years from the first issue of such stock." H. L. (Sc.)

On April 7, 1897, the appellants, having at that date certain unexhausted borrowing powers, passed resolutions for the creation, under the authority of the above-mentioned Acts, of a new class of stock to be called "the Edinburgh Corporation 2½ per cent. Redeemable Stock" to be issued for an amount not exceeding 750,000*l.* and upon the terms therein stated, and they further resolved that such stock should be "redeemable at par after the expiration of a period of thirty years from 15th May 1897."

On April 13, 1897, the appellants issued a prospectus to the public in the terms of the resolutions and they received applications for the full amount of the stock, which was duly allotted to the various applicants, including the respondents.

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The stock certificate was in the following form :—

"CITY AND ROYAL BURGH OF EDINBURGH.

No.

Register Folio.

Stock created and issued to date, 750,000*l.* The amount of stock authorised is unlimited.

Authorised by The Edinburgh Corporation Stock Act, 1894, and The Edinburgh Improvement and Tramways Act, 1896.

"This is to certify that the proprietor of pounds of Edinburgh Corporation Two and a half per cent. Redeemable Stock, subject to the Acts of Parliament relating thereto.

"Note.—\* \* \* Redeemable at par after Whitsunday, 1927.  
\* \* \* Interest payable half-yearly on 15th May and 11th November."

The respondents brought this action against the appellants for declarator that the appellants were bound to redeem this stock immediately on the expiry of May 15, 1927, on the application of the holders. The appellants maintained that they were under no obligation to redeem the stock, although they had a right to do so after that date.

The Lord Ordinary (Lord Skerrington) dismissed the action, but his Lordship's interlocutor was recalled by the Extra Division of the Court of Session (Lord Kinnear, Lord Dundas, and Lord



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Mackenzie), who declared that upon a sound construction of the statutes, resolutions, and form of certificate the defenders (the appellants) were bound to redeem the stock on the expiry of the day above mentioned.

1912. Oct. 28, 29. *Clyde, K.C.*, and *F. T. Cooper, K.C.* (both of the Scottish Bar) (with them *Harold Beveridge*), for the appellants. Upon the construction of s. 83 of the Act of 1896 this stock is redeemable, as the section says, at the option of the appellants, but the option is to be exercised at one and the same period, which the appellants are to fix. The construction contended for by the respondents gives no effect to the words "at the option of the corporation." Those words were inserted to dispel any possible ambiguity as to the meaning of "redeemable." Sect. 5 of the Act of 1894 is to the same effect and does not assist the construction of the Act of 1896. *Prima facie* "redeemable" means capable of redemption: *Erskine's Institute* II., viii. 2; *In re Chicago and North-West Granaries Co., Ltd.* (1); *In re Joseph Stocks & Co., Ltd.* (2) The purchasers of this stock take a perpetual annuity, but redeemable at the option of the appellants. The Legislature did not intend to impose any obligation on the appellants to redeem. The Extra Division proceeded on the view that this transaction was a loan, but "borrowing power" as defined in the Act of 1894 (s. 2) is not limited to a contract of loan, but deals with all the various ways in which the corporation can raise money and includes the creation of a perpetual annuity.

*Buckmaster, K.C.*, and *C. H. P. Macmillan, K.C.* (the latter of the Scottish Bar), for the respondents. "Redeemable" is an equivocal term and does not necessarily involve an obligation to redeem, but upon the construction of these statutes of 1894 and 1896 it imports compulsory redemption. Sect. 83 of the Act of 1896 merely gives the corporation an extension of the powers conferred upon them by the Act of 1894 and must be read with that Act. But the whole tenor of the Act of 1894 is irreconcilable with the view that the corporation have power to issue a stock which may last for ever but which the corporation have an option to redeem after a certain date. Upon

(1) [1898] 1 Ch. 263, at p. 267.

(2) [1912] 2 Ch. 134, n., at p. 140.

that reading there is no reason for the elaborate provisions as to fixing the date of redemption, and the provision that the stock shall all be redeemable at the same time becomes nugatory if "redeemable" means merely that there is to be a power of redemption not coupled with a duty to redeem. The option given to the corporation refers to the fixing of the time of redemption within the limit of sixty years. The intention of the Legislature was to empower the corporation to issue a stock which was not to be perpetual but was to be redeemable, i.e., redeemed within that period.

*Clyde, K.C.*, replied.

Reference was also made to ss. 8, 10, 15, 21, 41, and 55 of the Act of 1894, and to the following additional statutes and authorities:—1 & 2 Vict. c. 55, ss. 41, 44; the Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. cxxxii.), ss. 87, 88; the Local Authorities Loans (Scotland) Act, 1891 (54 & 55 Vict. c. 34), ss. 5, 22, 43; the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103; *In re Southern Brazilian Rio Grande do Sul Ry. Co.* (1); *In re Tewkesbury Gas Co.* (2)

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VISCOUNT HALDANE L.C. My Lords, this appeal raises a question of construction on a section in one of a series of private Acts, and, as is often the case in the construction of a private Act of this kind, the relation to each other of the sections in the various Acts which have to be considered is attended with some obscurity. But although the question is an important one, and although in the view which I have to express I am differing from judges, including Lord Kinnear, for whose opinion I have a very great respect, yet so fully and ably has the question been argued before us on both sides, and so unhesitating is the conclusion to which I have come, that I feel no hesitation in dealing with the case immediately on the conclusion of the argument.

The pursuers in the action were the British Linen Bank, and they brought an action of declarator to have it established that when a certain period should arrive the Corporation of Edinburgh were bound to redeem the holdings of a certain stock. The stock was issued by the Corporation of Edinburgh, the appellants

(1) [1905] 2 Ch. 78.

(2) [1911] 2 Ch. 279; [1912] 1 Ch. 1.

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in this case, in 1897, under powers contained in an Act passed in the year previous. The British Linen Company were the allottees of a part of that stock which was issued under a resolution passed by the Corporation of Edinburgh pursuant to the Act to which I have referred.

Now the whole question here is, whether the Corporation of Edinburgh are bound to redeem the stock which is held by the respondents after the expiration of a period of thirty years from May 15, 1897. Lord Skerrington held that they were not, and dismissed the pursuers' action. On appeal to the Extra Division of the Court of Session the learned judges who constituted that Extra Division took a different view.

My Lords, the question is really a very narrow one; it turns upon the construction of a few words in the Act of 1896, and if those words were quite clear in themselves, and the Act in which they occur contained no reference to other Acts, it would be easy to deal with the question shortly. Sect. 83 provides that the corporation, in addition to the powers which are contained in the previous Act of 1894, are now authorized to create and issue a new class of stock for any of their purposes "to bear any rate of dividend which the corporation may fix and all stock of such class shall be redeemable at the option of the corporation at one and the same period to be fixed by the corporation but not exceeding sixty years from the first issue of such stock." If I were reading these words without any obligation to have regard to anything else, I should read the words "at one and the same period to be fixed by the corporation" as referring to the expression "all stock," and as meaning that in whatever sections the main block of stock was issued the period of redemption was to be the same in all cases,—one period for all the sections. But the great question which arises is as to the meaning of the word "redeemable." As I interpret the word it means redeemable at the option of the corporation, the words which immediately follow "at the option of the corporation" relating to the word "redeemable."

Now, my Lords, that, so far, might be simple enough, but it ceases to be simple if you proceed to import into the meaning of the words "stock and stockholder" the relation of debtor and

creditor. To my mind the fundamental fallacy of the reasoning of the Court below is this, that the learned judges have tried this question as if it could only be a question of the relation of debtor and creditor. Of course if you get the relation of debtor and creditor, then the word "redeemable" may come to have a very different significance from what it has here. A creditor is *prima facie* entitled at some time to get his money paid and his debt thus redeemed. But if the relation is not one of debtor and creditor the situation may well be very different.

My Lords, the mere desire to raise money does not by any means necessarily import that you resort to the establishment of the relation of debtor and creditor. In England when the Usury Acts were in force it was legally impossible to borrow money at more than a certain rate of interest. Consequently, in order to get money, impecunious persons whose credit was not good were in the habit of doing what was very extensively done, namely, selling annuities. Sometimes these annuities had attached to them an option of repurchase on the part of the seller of the annuity. But although this was a device for getting round the difficulty of borrowing money, it substantially avoided anything that was really in the nature of borrowing by substituting the sale of a perpetual annuity. My Lords, I observe that the Corporation of Edinburgh in the earlier days of its history resorted to the same device. The first of the Acts to which our attention has been called is the Act of 1838, the purpose of which was to extricate the Corporation of Edinburgh out of some of its financial difficulties. From this Act it appears that at that time the Corporation of Edinburgh, in order to get over the difficulties which it had with its creditors, granted a number of annuities which were to satisfy those creditors. The only sections to which I need refer are ss. 41 and 44, which shew that the debts and obligations were to be "compounded by granting, free of all charges and deductions, to all and every person, in right of such debts, bonds of annuity in the manner and form hereinafter provided," at the rate of 3 per cent., and then over the page in s. 44 these are described in the form of bond as perpetual annuities.

My Lords, that was at any rate one mode in which the

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H. L. (SC.) Corporation of Edinburgh was enabled to raise money. Then  
 1912 under a later Act, the Act of 1879, there was conferred a power  
 EDINBURGH to raise money by mortgage, which shews the corporation  
 CORPORATION exercising the power of borrowing in its real form, that of borrow-  
 TION ing by granting debtor and creditor obligations with security.

BRITISH Now, my Lords, in that state of things the Act of 1894, which  
 LINEN BANK. is the first of the two Acts with which we have to deal, was passed.  
 Viscount The Act of 1894 contains several sections which throw light upon  
 Haldane L.C. the question with which we are concerned. First of all the  
 preamble refers to the annuities granted in favour of the city  
 creditors in lieu and satisfaction of their debts. Then there is a  
 definition of "statutory borrowing power" in s. 2 which shews  
 that the expression is meant to include almost every form of  
 raising money, whether by borrowing or by creating annuities.

Then we come to s. 5, which enables the Corporation of  
 Edinburgh to create a stock which is to take the place of the older  
 securities, and which is to be one of the modes, although I think  
 not the only mode, by which for the future the corporation is to  
 be able to raise its money. It is said in s. 5 that where the  
 corporation has any statutory borrowing power it is to be  
 empowered to create "redeemable stock to be from time to time  
 issued for such amount within the limit of the power" at a  
 certain price to bear dividends, as the corporation should resolve,  
 and to "become redeemable as hereinafter provided after the  
 expiration of one and the same period from the first creation of  
 corporation stock." Then sub-s. 3 says that "the resolution  
 for the first creation of corporation stock shall provide that  
 such stock shall be redeemable at the option of the corpora-  
 tion at par after the expiration of a period to be fixed by the  
 resolution not exceeding sixty years from the first creation of the  
 stock."

Now, my Lords, the reason why I read that section is because  
 it throws light upon the situation in which the corporation stood  
 when the Act of 1896 was passed. It shews to my mind that  
 the corporation had powers of raising money by issuing what  
 were strictly speaking perpetual annuities, redeemable in the  
 sense of being repurchasable upon certain terms, being the  
 terms which I have mentioned. The relation was not one of

debtor and creditor, the relation was one of seller and buyer of these annuities ; and that being so, the presumptions which seem to have weighed in the minds of the learned judges of the Extra Division do not seem to me to apply to these transactions. Reading the words quite simply as I have stated them they are consistent, and I think only properly consistent, with the view I have stated, which is that " redemption " merely means optional repurchase.

My Lords, the Act to which I have referred is by no means perfectly drawn, and s. 21 in particular, which refers to stock " issued for the whole term limited for the continuance of any loan " or issued " for part only of that term," is a section which does not seem to fit in well with the earlier sections of the Act. But the learned counsel for the appellants drew our attention to the circumstance that this section had been imported by the draftsman out of a quite different Act, the Local Authorities Loans (Scotland) Act, 1891, of which it constitutes s. 22, into the middle of this one, and that the reason why it seemed to fit ill was that its language belonged properly to a statute of another structure and dealing with a different kind of security. It may, I think, be possible to give a meaning to these words by reading them as applying to a case where part of the issue (all of which is to be redeemed at one time, if redeemed at all, by the corporation in the exercise of its option) has been issued late, and has not got the whole term to run. It is possible in that case that there may have to be re-borrowing, and the not very happy wording of the section may be said to cover that case. But whether the section is properly worded or not, in my opinion there is nothing in the section which is sufficient to cut down what to my mind is the plain effect of the previous section, s. 5 ; and I am confirmed in this view when I turn to s. 41, which relates to the appointment of a judicial factor. In s. 41 of the Act of 1894 a judicial factor is only appointed to recover the dividends ; there is not a word about capital, or any suggestion that it is contemplated that there should be a capital sum due to a creditor which might have to be recovered ; whereas if you turn to the Act of 1879, and equally if you turn to the general Act just referred to of 1891 which

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regulates borrowing in Scotland by local authorities, you find the power of the judicial factor there applied to the recovery of capital.

My Lords, having said so much, it seems to me that the question resolves itself into a very simple one. When I turn to the Act of 1896, s. 83, which I have already read, and on which this question turns, it becomes, in the state of things which I have indicated, quite natural that the language should be what it is, and that the appellants should be able legitimately to rely upon it in support of their contention. If the relation is not one of debtor and creditor, but one of the seller and the buyer of annuities, then the words "and all stock of such class shall be redeemable at the option of the corporation at one and the same period to be fixed by the corporation not exceeding sixty years" would naturally import "repurchasable at the option of the corporation."

My Lords, I have come to the conclusion that this is the true view of the statute, and that under the circumstances the only result at which I can properly arrive is that the view of the Lord Ordinary was the correct view, and that this action ought to have been dismissed. This appeal must therefore be allowed; and I move your Lordships accordingly.

EARL OF HALSBURY. My Lords, I hesitate very much to add a single word to a discussion, which has now proceeded practically for two days, on the construction of three words. I speak with most unfeigned respect for the very distinguished judges from whom this appeal comes, but I say that I have been unable to feel the difficulty with which some of them seem to have been possessed. My Lords, so far as I am concerned, I am contented with a single sentence in the Lord Ordinary's judgment which seems to me to comprehend the whole case and upon which the case turns. "Any one" he says "who alleges that a redeemable stock must be redeemed is bound in my opinion to shew the existence of the obligation upon which he founds and this the pursuers have failed to do." My Lords, I believe that that sentence comprehends the whole that it is necessary to say upon the matter, and I entirely concur with the motion which the Lord Chancellor has proposed.

LORD ATKINSON. My Lords, I concur.

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LORD SHAW OF DUNFERMLINE. My Lords, I agree.

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*Interlocutor of the Extra Division of the Court of Session of Scotland reversed and Interlocutor of the Lord Ordinary restored. The respondents to pay the costs in the Court below and of the appeal to this House.*

*Lords' Journals, October 29, 1912.*

Agents for appellants: *Beveridge, Greig & Co., for Sir Thomas Hunter, W.S., Edinburgh.*

Solicitors for respondents: *William A. Crump & Son, for Mackenzie & Kermack, W.S., Edinburgh.*

[HOUSE OF LORDS.]

BRITISH GLANZSTOFF MANUFACTURING COMPANY, LIMITED . . . . .	} APPELLANTS;	H. L. (Sc.)* 1912 Oct. 28.
AND		
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED	} RESPONDENTS.	

*Building Contract—Construction—Liquidated Damages.*

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland. (1)

The question raised by this appeal was whether upon the construction of a building contract entered into between the appellants (the pursuers) and William Brown & Sons, contractors, the appellants were entitled to claim as part of their damages for breach of contract a sum of liquidated damages in respect

\* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.



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of the non-completion of the contract within the stipulated time. The respondents (the defenders) were an assurance company which guaranteed all loss and damage which the appellants might sustain through the failure of the contractors to carry out their contract. The contractors became bankrupt and suspended the works, and the appellants thereupon engaged another firm to complete them, but they were not completed until at least six weeks after the date specified in the original contract.

The First Division of the Court of Session (the Lord President, Lord Kinnear, Lord Johnston, and Lord Mackenzie), affirming the decision of the Lord Ordinary (Lord Dewar), held, upon the construction of clauses 24 and 26 of the contract, that the clause as to liquidated damages applied only where the contractors had themselves completed the contract and did not apply where the control of the contract had passed out of their hands.

*Ure, K.C.*, Lord Advocate (of the Scottish Bar), and *Hudson, K.C.* (of the English Bar) (with them *David Anderson* (of the Scottish Bar)), for the appellants.

*Atkin, K.C.*, *Constable, K.C.*, and *Norie Miller* (the two latter of the Scottish Bar), for the respondents, were not called upon.

The House affirmed the decision of the First Division of the Court of Session upon the grounds stated by that Court.

*Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.*

*Lords' Journals*, October 28, 1912.

Agents for appellants: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, *Liverpool*, and *Hume McGregor & Co.*, *S.S.C., Edinburgh*.

Agents for respondents: *Freshfields*, for *Simpson & Marwick*, *W.S., Edinburgh*.

[PRIVY COUNCIL.]

ALLAN McPHERSON AND ANOTHER . . . .

PLAINTIFFS ;

J. C.\*

AND

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TEMISKAMING LUMBER COMPANY, }

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DEFENDANTS.

July 23, 24,  
25 ;  
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Ontario Crown Timber Act (R. S. Ont., 1897, c. 32)—Right of Licensee in Land—Interest of Licensee exigible under Ontario Execution Act (9 Edw. 7, c. 47)—Assignee of License after Writ of Fi. Fa. issued.*

Under a writ of fieri facias against “the goods and chattels, lands and tenements” of a judgment debtor his interest in lands as a licensee thereof under the Crown Timber Act (R. S. Ont., 1897, c. 32), which includes a title thereto subject to the conditions of the license, is liable to seizure and sale under Ontario Execution Act (9 Edw. 7, c. 47).  
*Glenwood Lumber Co., Ltd. v. Phillips* [1904] A. C. 405, followed.

Where execution is levied upon timber cut by an assignee of the license under an assignment made subsequently to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable consideration without notice of the execution and has paid his purchase-money.

APPEAL from a judgment of the Court of Appeal (September 20, 1911).

The appeal arose out of an interpleader issue in pursuance of an interpleader order dated June 22, 1910, in which the appellants the execution creditors were plaintiffs and the respondents were the claimants. It raised the question whether certain saw-logs cut by the respondents and seized by the sheriff of the district under executions against the lands and goods of the firm of A. McGuire & Co. were at the time of seizure exigible under the said executions as against the respondents.

On January 11, 1907, the judgment debtors had obtained a license of the lands in suit under the Crown Timber Act (R. S. O., 1897, c. 32). On June 9, 1909, a writ of fieri facias was issued against their lands and goods out of the High Court for Ontario

\* *Present* : EARL OF HALSBURY, LORD MACNAGHTEN, LORD ATKINSON  
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J. C.      in an action brought by the appellant Booth and received by the  
1912      sheriff on June 16, 1909. On November 30, 1909, a similar writ  
McPHERSON      was issued in an action by the appellant McPherson and received  
v.      by the sheriff on December 2, 1909; on which date the judgment  
TEMISKAM-      debtors were restrained by interim injunction (afterwards made  
ING LUMBER      perpetual) from proceeding with a transfer of the said timber  
COMPANY,      license and of the right to cut timber. On February 28, 1910, a  
LIMITED.      further writ of execution was received by the sheriff in an action  
—      by the appellant Booth.

The respondent company was incorporated for the purpose of taking over the judgment debtors' business as lumber jobbers. It agreed to take a transfer of their license so soon as the injunction was disposed of and meanwhile obtained permission to enter and cut timber. With the cognizance of the Department of Lands, Forests, and Mines over 19,000 logs were cut by the company during the period from January to April, 1910; and these on June 11, 1910, were seized by the sheriff under the said writs.

Teetzel, the trial judge, on March 3, 1911, delivered judgment declaring that the saw-logs in question were exigible under the execution of November 30, 1909, in favour of the appellant McPherson, but that they were not exigible under the other executions.

This judgment proceeded on the ground that no execution bound the right to cut timber upon Crown lands, but that as the respondents had notice of the injunction of December 2, 1909, they could not acquire any interest in the timber that might subsequently be cut except subject to the satisfaction of the execution of November 30, 1909. As regards the other executions the judgment, following the decision of the Court of Appeal in *Canadian Pacific Ry. Co. v. Rat Portage Lumber Co.* (1), held that they did not create a charge on uncut timber or preclude the transfer of the right of the timber licensee.

The Court of Appeal unanimously reversed this judgment in regard to the execution of November 30, 1909, and held that the saw-logs in question were not exigible under any of the writs of execution.

(1) (1905) 10 Ont. L. R. 273.

In the view of the Court of Appeal the interest of a licensee under the Crown in a timber limit is not subject to seizure or sale under execution. In regard to the contention that the respondents' purchase was made in fraud of the creditors of A. McGuire & Co., the Court held that there could be no fraud upon creditors in dealing with property which under the law the creditors could not reach, and that, the transfer to the respondents being real, valid, and made for value, the beneficial interest in the timber when cut was in the respondents.

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*Laidlaw, K.C.*, and *Nesbitt, K.C.*, for the appellants, contended that they were entitled to a declaration that the logs seized in execution were exigible under the said writs as against the respondents. Exclusive possession was taken of them by the sheriff on June 11, 1910, under the Execution Act (Ont. Act 9 Edw. 7, c. 47), which by s. 9, sub-s. 1, bound the goods and lands against which it was issued from the time of delivery thereof to the sheriff. The proviso in that section that the writ should not prejudice the title to goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired title notice that such writ had been delivered to the sheriff and was in his hands unexecuted, did not apply to the issue in this case. The evidence shewed that the respondents had notice of the writs and also of the injunction, and that no title to the logs had been acquired by the respondents as against the appellants either in good faith or for valuable consideration. As to interests in land being liable to seizure and sale under a writ of fieri facias they referred to the Execution Act, s. 32, and to s. 8 of the Transfer of Real Property Act cited therein. Upon the question whether the interest of the judgment debtors was an interest in land they referred to the Crown Timber Act, ss. 1, 2, 3, and 14, and to the Crown Timber Regulations, ss. 5, 7, 16, and contended that thereunder the Minister had power to grant licenses which gave to the grantees the right to take and keep exclusive possession of the land described in the licenses, and all rights of property in the timber cut vested in the holders of the licenses. The right to cut and remove timber is therefore an interest in land liable to seizure and sale. Logs



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cut and removed from the land continued to be liable to seizure and sale under the execution against goods and chattels whether the licensee had an interest in land or not. Any purchaser acquiring title from the judgment debtors would acquire subject to the writs of fieri facias. The evidence shewed that the judgment debtors were licensees at the time of the cutting and removal of the logs and were in charge of all the operations under the licenses; and the respondents did not acquire any title thereto in good faith. They referred to *Richards v. Johnston* (1); *Glenwood Lumber Co., Ltd. v. Phillips* (2); *Martyn v. Williams* (3); *Ducondu v. Dupuy* (4); *In re J. D. Spier Lumber Co. Assessment* (5); *Canadian Pacific Ry. Co. v. Rat Portage Lumber Co.* (6); *Russell v. East Anglian Ry. Co.* (7)

*Sir R. Finlay, K.C.*, and *Geoffrey Lawrence*, for the respondents, contended that the Court of Appeal was right in holding that the saw-logs in question were not exigible under the writs issued. They relied upon *In re J. D. Spier Lumber Co. Assessment* (5) and *Canadian Pacific Ry. Co. v. Rat Portage Lumber Co.* (6), and contended that those cases correctly decided that licenses to cut timber upon Crown lands did not confer any right of property in the land or in the standing timber. It followed that no executions can attach to the land or to the timber until severance. The property both in the land and the uncut timber remains in the Crown. As regards the cut timber, the property in that was not in the judgment debtors but in the respondents, to whom it had passed from the Crown on the severance of the timber from the soil. The evidence shewed that the Crown had assented to the assignment of the license to the respondents, who thereupon acquired a good title thereto. They thereupon cut the timber on their own account and with the expenditure of their own capital, and not in any way on behalf of the judgment debtors. Neither the writs nor the injunction had any effect in law upon the license and did not prevent the respondents acquiring a good title, and there was

(1) (1859) 4 H. & N. 660.

(2) [1904] A. C. 405, 408.

(3) (1857) 1 H. & N. 817, 827.

(4) (1883) 9 App. Cas. 150.

(5) (1907) 14 Ont. L. R. 210.

(6) 10 Ont. L. R. 273.

(7) (1850) 3 Mac. & G. 125.

not in the transaction or in the mode in which it was carried out any fraud on the creditors of the judgment debtors, for the transaction only affected property which was entirely out of their reach. Neither the judgment debtors nor their creditors had any beneficial interest in the timber after it had been cut by the respondents under the license assigned to them.

*Nesbitt, K.C.*, replied.

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The judgment of their Lordships was delivered by

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LORD SHAW OF DUNFERMLINE. This appeal arises out of interpleader issues. As put in the question for trial, the issue was whether certain goods and chattels consisting of saw-logs seized in execution by the sheriff of the district of Nipissing, in the Province of Ontario, under the writs of fieri facias after mentioned, "for the having in execution of the judgments" upon which the writs were issued, "were at the time of the seizure by the said sheriff exigible under the said executions of the said execution creditors as against the said claimants the Temiskaming Lumber Company, Limited."

The execution creditors were the appellants, Allan McPherson and William Booth. Executions had been issued upon judgments recovered by these appellants respectively, the judgments being for the amounts of debts due by A. McGuire & Co., who were or had been lessees or licensees of certain timber lands in the district of Nipissing, in the Province of Ontario. The writs dealt with by the trial judge were three in number and were duly received by the sheriff as follows, namely, (1.) at the instance of McPherson, received on December 2, 1909, this being for the sum of \$3961; (2.) and (3.), at the instance of Booth, received on February 26, 1910, for \$729 and \$317 respectively. These two latter appear to have been repetitions of previous executions for the same amounts received by the sheriff on June 16, 1909.

The material circumstances of the case, so far as the McGuires are concerned, are as follows: Annie McGuire, wife of Cornelius McGuire, obtained a timber license in ordinary form from the Government of Ontario of certain parcels of land in the townships of Bryce and Beauchamp on January 11, 1907. The license was

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subsequently renewed until April 30, 1912. Annie McGuire was the sole partner of A. McGuire & Co., and she appointed Cornelius McGuire, her husband, as manager. She obtained advances from, and incurred debts to, the appellants, who obtained judgments therefor. Writs of fieri facias were issued and delivered in regular form for payment of the moneys due against (to use the exact language of the writs) "the goods and chattels, lands and tenements, of A. McGuire and Company, in your bailiwick." In the course of the months of January, February, and March, 1910, considerable cutting operations were made, and the logs cut were placed on the ice and floated down the rivers to Lake Temiskaming. The sheriff acting under the execution took exclusive possession of these logs on June 11, 1910. The interpleader order was issued on the 22nd of that month.

There is no objection to the form of these proceedings. By the Execution Act in force in Ontario at that date, namely, the Consolidation Statute of April 13, 1909, "A writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution. Provided that subject to the provisions of the Bills of Sale and Chattel and Mortgage Act, no writ of execution against goods shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title had notice that such writ had been delivered to the sheriff and remains in his hands unexecuted."

There is no dispute in this case that the respondents, the Temiskaming Lumber Company, Limited, had at least full knowledge of the writs of execution at the instance of the appellant McPherson. (The position of the company with regard to the rights of Booth and of McGuire's indebtedness in general is hereafter dealt with.) Accordingly, no question arises as to the application of the proviso, it being an admission that the Temiskaming Lumber Company, thus charged with notice of the execution and proceedings, is in no better position to resist legal effect being given to these than the original debtors, Messrs. A. McGuire & Co., would have been. The point,

however, which has been taken by the respondents is this, that while it is conceded that under the law of Ontario execution may proceed against both the goods and the lands of a debtor, a timber license and all the rights, privileges, and interests of the licensee thereunder constitute, so long as the timber stands, neither the one nor the other, but form an unattachable legal entity. This point, and it is accordingly of much importance to the Province, gravely affects the rights of timber licensees, their mercantile credit, and the security which they are able to afford in commercial dealings.

It is therefore expedient to consider the position of those holding timber licenses under the law of Ontario, in view of the contention that, valuable as these licenses may be to the licensees, they nevertheless constitute no source of legal credit, because they are unavailable to execution creditors.

The statute regulating the effect of timber licenses in Ontario is that of 1897, chapter 32 of the Revised Statutes, known as the Crown Timber Act. After making provisions for the grant of licenses to cut timber on the ungranted lands of the Crown, at such rates and subject to such conditions, regulations, and restrictions as may be established by the Lieutenant-Governor in Council, s. 3 provides :

“(1.) The licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established.

“(2.) The licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber, cut within the limits of the license during the term thereof, whether the trees, timber, and lumber are cut by authority of the holder of the license, or by any other person, with or without his consent.

“(3.) The licenses shall entitle the holders thereof to seize in revendication or otherwise, such trees, timber, or lumber where the same are found in the possession of any unauthorised person, and also to institute any action against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any.”

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Provisions are made for the continuation of the grant to licensees, s. 5 of the statute being to the effect that "license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Commissioner." A variety of provisions occurs with reference to the obligations of licensees, who are bound, inter alia, to keep, and keep open to inspection, such records and books as may be required, and to furnish satisfactory proof of the number of pieces and descriptions of timber, saw-logs, &c. It should be added that, in respect of these rights, the licensee comes under liability to taxation and assessment.

With reference to the land itself, the right of the licensee therein is clear and distinct, namely, it is a right to take and keep exclusive possession of the lands described, with, in the second place, a power to cut and remove timber therefrom. As regards the timber, the property therein, when cut, is vested in the licensee, and this vesting takes place whether the operations of cutting are carried out with or without the licensee's consent.

In the present case, Meredith J. observes: "I am still unfortunate enough to be unable to understand why the interest in land of a licensee under the Crown Lands timber license is not an interest in land liable to seizure and sale under a writ of execution as well as liable to assessment for the purpose of taxation." Their Lordships find themselves in the same position. The learned judges^a of the Court of Appeal, however, hold that the matter is concluded by authority, and, in particular, by the authority of *Canadian Pacific Ry. Co. v. Rat Portage Lumber Co.* (1) in 1905. This case will be immediately referred to. But it is important to note that the scheme of the Execution Acts of the Province of Ontario was plainly meant, and, in their Lordships' opinion, it is fitted, to attach not only goods and chattels, but also landed rights. In their Lordships' view, the observation of Lord Davey in *Glenwood Lumber Co., Ltd. v. Phillips* (2) is applicable to the present case. The Act there being construed was a Newfoundland statute of a character similar to that now under construction. It was decided that, in ascertaining

(1) 10 Ont. L. R. 273.

(2) [1904] A. C. at p. 408.

what was the nature of the rights under such a statute, the question was not one of words, but of substance. "If," said Lord Davey, "the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. . . . It is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein, subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased, and to prosecute all trespassers thereon. The operative part and habendum in the license is framed in apt language to carry out the intention so expressed in the Act; and their Lordships have no doubt that the effect of the so-called license was to confer a title to the land itself on the respondent." All this language is applicable in terms to the statute of Ontario now being dealt with, similar provisions occurring therein. Their Lordships see no reason to doubt the soundness of the view thus expressed by Lord Davey, or its applicability to rights of a similar character in the Province of Ontario. In their opinion, a title to the land itself, subject, of course, always to the restrictions, conditions, and limitations laid down in the license, is in the licensee of timber lands.

When, accordingly, the Execution Act of Ontario (9 Edw. 7, c. 47), already referred to, states that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution," it would appear not open to doubt that timber lands and the rights of a licensee therein under a timber license are included under this description. This view appears to be expressly confirmed by s. 32 of the Execution Act, which provides that any estate, right, title or interest in land shall be liable to seizure and sale in execution in the same manner and on the same conditions as land. But apart from that section the nature of the title of a licensee is a title (it may be limited in character) to the land itself, and in their Lordships' opinion, accordingly, it falls within the scope of the Execution Act. In the Court of Appeal,

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however, the learned judges did not apparently feel free, if they entertained this view, to give effect to it, on account of the decision in the *Rat Portage Case* (1) above referred to.

In the *Rat Portage Case* (1) the execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person, the object of the partnership being to remove the ties in order to fulfil a contract with a railway company. Undoubtedly the object of the partnership was that the ties when cut should be the property of the concern.

In the Court of Appeal it rather appeared that the broad question now to be determined was—by reason of a concession made at the Bar—not one upon which a judgment was really asked. It was conceded by the counsel for the execution creditor that the writ was not a lien or charge “upon any of the timber embraced in the Crown timber permit until it has been severed from the soil.” But the contention was that, once severance of the timber took place, the execution attached, notwithstanding any agreements in respect of the timber made before the severance. The parties do not appear to have entered into actual contest upon the question of the real nature of the right of the timber licensee, in so far as the land itself was concerned, or in so far as affected the comprehensive rights of a licensee in land. In these circumstances, their Lordships do not feel that the true issue under the existing Execution Act of Ontario has been fully dealt with. It is interesting to observe from the dictum of the learned Chief Justice Moss that “if an agreement is not entered into with a colourable purpose, or with an intent to defeat or defraud creditors, as by a mere pretended partnership, but is entered into with the bona fide intention of forming a partnership and carrying on a business, it is not open to attack at the instance of creditors.” If this dictum points to the impossibility of defeating the execution creditor’s rights by the colourable device of a partnership or other contract effecting a change of title, so formed as to defeat the execution, their Lordships agree with it. But the right of an execution creditor in no case interferes with the proprietary interests of the execution debtor, except to the effect

(1) 10 Ont. L. R. 273.

that, while the execution debtor is free to deal with his property, the property so dealt with remains subject to the rights of the execution creditor therein ; these last remain unaffected and unimpaired. The circumstances of the present case in this regard, and the dealings of A. McGuire & Co. with their rights as licensees while the execution stood, will be presently referred to. But when the learned Chief Justice states that "the interest transferred by the debtor is not one exigible under a writ of execution, and is not affected by any lien or charge arising therefrom ; there is nothing to affect the debtor's interest, and by no process could he be compelled to use it for the benefit of his creditors," their Lordships find themselves unable to agree with these propositions. In practice they would seem to operate greatly to the diminution of the credit otherwise available to timber licensees, and they would manifestly destroy the security for advances upon timber lands, however valuable, until actual severance of the timber. But this consideration might, of course, be counterbalanced by others, and in any view would have to yield to the fair construction of the words of the Execution Act. These words have been already cited. The subject of execution being land, in the broad sense already referred to, there seems no reason to question the comprehension within that term of timber licenses, in accordance with the principle set forth by Lord Davey in the *Glenwood Case*. (1)

It seems not improbable that a judgment in the above sense would have been pronounced by the learned Canadian judges had they not felt themselves foreclosed by this authority. In their Lordships' view, however, the construction of the statute is clear. Under the Act the position of the holder of a timber license is, (1.) that he is the possessor of an asset of the nature of land ; (2.) that that asset is, accordingly, subject to execution ; (3.) that the execution does not interfere with the property of the debtor or his power to assign or transfer, subject only to the security of the execution creditor not being impaired ; (4.) and when there is cut timber on the land at the date of execution, that timber is, of course, the instant subject of seizure ; (5.) should the timber be cut subsequent to the date of the execution, it is then instantly

(1) [1904] A. C. at p. 408.

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attached, and the execution cannot be defeated, because the cutting operations had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights; and (6.) the only exception to this is the case of a title being acquired by a third party in good faith and for valuable consideration and without notice of the writ having been delivered to the sheriff and remaining unexecuted. It seems to their Lordships that if these principles are violated the way is opened up to the defeat of the execution creditor's rights, and, as the circumstances of this case very plainly shew, to transactions of a questionable nature under which debtors would endeavour to avoid their just obligations.

The principles now set forth are in entire accord with familiar law. The law was expressed thus by Parke B. in what still stands as the leading case of *Samuel v. Duke* (1): "Now it is perfectly clear to me, both upon the decided cases and the reason of the thing, that if a writ of execution has been delivered to the sheriff, the defendant may convey his property, but that the sheriff has a right to the execution notwithstanding the transfer. . . . the right . . . speaks from the time of the delivery of the writ upon the receipt of which the sheriff is to levy. But, subject to the execution, the debtor has a right to deal with his property as he pleases, and if he transfers it in market overt, the right of the sheriff ceases altogether."

Under the Execution Act of Ontario the right of the execution creditor is only defeated if the purchaser has acquired a title in good faith and for valuable consideration without notice of the execution, and has paid his purchase-money. The only question therefore remaining in this case is whether the Temiskaming Lumber Company, the respondents, so acquired in good faith and for valuable consideration and without notice. It is really unnecessary—the documents and admissions of parties standing as they do—to enter upon this question in detail. So far as the McGuires are concerned, they appear to have deliberately set themselves to defeat the rights of the appellants as judgment creditors, and, in their Lordships' opinion, in this attempt they

(1) (1838) 3 M. & W. 622, at p. 629.

obtained the active assistance of one Murphy, of the Traders Bank, and of the respondents. The scheme was to make a transfer of the license before any timber was cut, but to make the transfer in such a way that very substantial interests would still remain to McGuire. The scheme was to develop, and has developed, so that, after the transfer was made, the cutting thereof was to be ascribed to the transferees, and when the execution was levied upon the timber so cut, the execution was to be defeated on the plea that the property in the cut timber was by that time in the transferees, who were not the execution debtors. These, namely, McGuire & Co., would thus slip out of liability by the transfer of the license for valuable consideration, and by having divested themselves of the right to cut timber and invested others who could cut and remove it but yet would not be bound by the execution. This operation, which is essentially a transaction of bad faith, so far as the execution debtors were concerned, might, of course, have been possible on the footing that the rights of the licensee were not a title to land and were unattachable by execution. Such a state of the law facilitated an operation by which the execution debtor could evade the rights of his creditors by simply standing aside from the active operations of cutting timber under his license and by assigning his license, with the right to cut timber, to somebody else. What happened in the present case was upon these lines, and, without entering upon the matter at large, their Lordships think that the whole series of transactions was simply a juggle to defeat the rights of the execution creditors of McGuire. Teetzel J. appears to be well justified in his observation: "As respects the company and Murphy, both of whom had notice of the injunction, it is perfectly plain that, while the agreement for sale may not be impeachable as fraudulent as against creditors, the method of carrying it out was primarily adopted for the purpose of enabling McGuire & Co. to evade the injunction and to circumvent the plaintiff McPherson in his efforts to realize his judgment out of McGuire & Co.'s interest in the license and the right to cut timber thereunder, and I must say that upon this record the course pursued by the Traders Bank was such as without which the dishonest purpose of McGuire & Co. could not have been so nearly accomplished."

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J. C. So far as the respondents, the Temiskaming Lumber Company,
 1912 are concerned, their position does not appear to be one whit better.
 MCPHERSON By the time of the formation of the company in January, 1910,
 v. things had reached the stage of legal proceedings against
 TEMISKAM- A. McGuire & Co., and an injunction had been obtained
 ING LUMBER against that firm against parting with its property. When,
 COMPANY, accordingly, the offer to sell to the Temiskaming Company,
 LIMITED. dated January 11, 1910,—that is to say, more than a fort-
 night before even the first meeting of provisional directors,—
 was considered, “it was resolved that said offer be accepted
 subject to this: that the transfer of said license shall not be
 made until the pending injunction against A. McGuire and
 Company, restraining the transfer of the said license, shall have
 been disposed of, but in the meantime that the company shall
 go upon the limits and carry on the operation of cutting and
 removing timber therefrom.” The pending injunction was not
 disposed of in foro contentioso, but, as narrated in the appellants’
 case, “a bond with sufficient sureties was executed by and on
 behalf of the respondents, and approved by the Court for the
 sum of \$10,000, to secure an approximate amount sufficient
 for the payment of all the said writs of execution (i.e., both
 McPherson’s and Booth’s), and the logs were taken possession of
 by the respondents.”

Their Lordships incline to the opinion that, with reference to the particular matter in issue in this suit, namely, the cutting of the timber and the rights therein, McGuire & Co. simply continued as before the formation of the Temiskaming Company, and so far as the transaction of transfer was concerned Annie McGuire took the entire purchase in \$9000 of stock allotted to her in the Temiskaming Company. But this ostensible transaction made no real difference to the working of the license. For although the company was constituted in January, 1910, a document is produced, namely, the oath of Cornelius McGuire, furnishing a statement “of the total number of pieces of saw-logs, boom timber, and other timber got out by or for the said A. McGuire and Company, or otherwise acquired by them, during the past winter.” This statement was made in terms of the Crown Timber Act, and is dated May 28, 1910. It is in these

circumstances impossible, in their Lordships' view, for the respondents to set up the plea that they acquired the rights of McGuire & Co. in good faith, and are so entitled to defeat the execution laid on at the instance either of McPherson or of Booth. As already mentioned, it was upon the timber so cut that execution was levied, and to relieve the execution upon it and to meet the issue in this action an arrangement as to the setting aside of \$10,000 was made. In their Lordships' opinion, the whole circumstances are such as to shew that there has been an attempt to defeat the rights of the execution creditors, and that the respondents were aware of this attempt and have pursued a course of conduct with a view to its success.

In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to fall to be satisfied out of the \$10,000 secured by the bond, and that the appellants should be found entitled to the costs of this appeal and in the Courts below.

Their Lordships will humbly advise His Majesty that the judgments appealed from should be reversed, that the cause be remitted to the Court of Appeal to dispose of the actions in accordance with this judgment, and that the costs should be dealt with as above stated.

Solicitors for appellants : *Harrison & Powell.*

Solicitors for respondents : *Blake & Redden.*

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[PRIVY COUNCIL.]

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AND

July 26, 29, THE SOVEREIGN BANK OF CANADA . . . PLAINTIFFS.
30;
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Suit by Assignees from Receivers of a Company not in Liquidation—Contracts by the Debtors with the Company—Right of Set-off in respect of Damages for Breach.

The respondents sued as assignees from the receivers appointed in a debenture-holders' action of a company not in liquidation to recover the price of goods supplied by the receivers to the appellants under contracts with the company subsisting at their appointment, but subsequently declared by them to be cancelled. The appellants claimed to set off against the price sued for damages for the breach of the said contracts:—

Held, that they were entitled so to do. The amount sued for was due under the old contracts with the company which was responsible for the breach, and not under new contracts with the receivers. In the absence of a liquidation the persona of the contracting company remained legally intact as well as its contracts, though controlled by the receivers, who continued and managed its business as officers of Court and had taken no steps to determine the relations between the company and the appellants.

APPEAL from a judgment of the Court of Appeal (July 13, 1911) affirming a judgment of Britton J. (July 8, 1910).

The action was brought by the respondents as assignees from the receivers and managers appointed by the Court of the Imperial Paper Mills Company, Limited, of the invoice price of certain goods purchased by the appellants. The substantial question decided was whether the appellants were entitled to set off against the purchase price of such goods damages for breaches of contract.

The appointment of the receivers was made in a debenture-holders' action, the first receiver, John Craig, being appointed by an order of Court dated October 27, 1906, and the second receiver, George Edwards, by an order dated January 9, 1907, with

* *Present*: VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

authority to continue the business of the company. Under the authority of these orders and of an order dated December 10, 1906, the receivers borrowed from the respondents the amount owing in respect of certain invoices and assigned to the respondents the goods covered by the invoices and the moneys payable therefor.

At the time of their appointment contracts were in existence between the said company and the appellants for the supply of paper. Most of these contracts were for periods of three years and a number of them had more than two years to run when the receivers were appointed.

After the appointment of receivers the appellants continued to send in orders for paper required by them, which orders were under the existing contracts. The receivers were duly paid for all paper supplied by them to the appellants during the receivership up to the date of a shipment made on April 27, 1907. On April 6, 1907, they wrote to the appellants as follows:—

“Regarding the position of contracts with us, we are filling the contracts simply and solely as single orders as they come in, and while not legally bound to accept any more, we feel equally that we are not morally bound to do so in respect of our having filled some parts of them during the past few months. We certainly cannot possibly agree to confirm them subject to a four or six months’ notice. The situation is such that we cannot guarantee to accept another specification. Each specification as it comes in will be accepted or rejected as if it were a new order independent of any contract. Further than this we cannot go.”

On June 17, 1907, the receivers notified the appellants that they could not execute any more orders under the existing contracts. On the following July 27 the respondents gave notice to the appellants of the assignment to them of the moneys payable in respect of the shipments made by the receivers on and after April 27; and on November 7 in the same year sued to recover \$15,754.30, being the invoice price of paper shipped by the receivers to the appellants between April 27 and June 24, 1907. The appellants pleaded that the amount due was only \$12,113.68 and claimed to set off against this sum the damages resulting from the breach of the contracts made with them by the company.

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Britton J. found that the receivers did not assume the contracts with the company existing at the time of their appointment, or elect to continue them, or agree that the damages, if any, sustained by the appellants should be set off against the price of the paper sold to the appellants during the receivership. He considered that the power granted by the Court to the receivers to carry on the business of the company could only be exercised by raising money and giving security, which would be inconsistent with allowing a purchaser to set off an old debt against the purchase-money.

In the Court of Appeal Garrow J. delivered the judgment of the majority to the effect (1.) that there was no express adoption of the company's contracts by the receivers and managers; (2.) assuming that they had power to do so, it would be absolutely impossible to imply such an adoption from the evidence in this case; (3.) that the only reasonable inference from the evidence was that the paper the proceeds whereof were assigned to the respondents in May and June, 1907, was supplied to the appellants upon the terms of the letter of April 6 from the receivers to the appellants not upon any earlier contract, but as upon entirely new orders; (4.) that even if this view were mistaken the appellants were not entitled to set off damages they had sustained against the amount of the invoices assigned to the respondents because (1.) in carrying on the business the receivers could not impose an obligation such as that arising under the current contracts upon the mortgagees without the leave of the Court, and (2.) the right of equitable set-off given by sub-s. 5 of s. 58 of the Judicature Act (R. S. Ontario, 1897, c. 51) only extends to those equities which arise out of the same transaction as the debt, and do not include cross-claims arising from transactions independent of the debts assigned; (5.) that it was not proved that the receivers and managers as such entered themselves into contracts for a continuous supply of paper of which the appellants had shewn breaches either before or after the plaintiffs acquired title.

Meredith J. in his dissenting judgment found (1.) that the current contracts remained in full force; (2.) that specifications were given to and accepted by the receivers and managers under the existing contracts; (3.) that there was no sufficient evidence to

prove that the receivers and managers terminated the old contracts and entered into new contracts in respect of specifications made by the appellants under the current contracts ; (4.) that the receivers purported to cancel the current contracts and refused to ship further paper under them because they had become unprofitable ; (5.) that the respondents could only succeed if they could establish that the current contracts were ended by mutual consent, and a new and separate contract made between the appellants and the receivers when each order was given, and that such contention was not in accord with the evidence ; (6.) that the appellants' right arising out of the breach of contract was an equity which they were entitled to set up against the respondents' claim ; (7.) that such equity directly arose by reason of breaches of the same contracts as those assigned to the respondents.

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Buckmaster, K.C., Herbert S. Preston, and G. L. Smith, for the appellants, contended that the action should have been dismissed. The point was whether the interposition of receivers made any difference in the rights of the parties to the contracts. A receiver appointed by the Court in a debenture-holders' action is not personally bound by contracts existing at the date of his appointment ; nor does his appointment determine those contracts. He is at liberty to satisfy the obligations of his company thereunder, but if he does do so he cannot enforce the rights of the company in respect of them except subject to any counterclaim arising out of the said contracts. The receivers in this case continued for a time in right of the company to satisfy the contracts existing at their appointment and afterwards in the same right declined to continue them. They could not therefore occupy a better position when the contracts were broken than the company would have done. Accordingly neither they nor the respondents as their assignees could recover from the appellants debts due thereunder at the date of breach except subject to the appellants' claim to set off damages which such breach occasioned. They referred to *Young v. Kitchen* (1), which was approved in *Government of Newfoundland v. Newfoundland*

(1) (1878) 3 Ex. D. 127.

J. C. *Ry. Co.* (1); *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (2)
 1912 The contract was not ended when the receiver was appointed:
 PARSONS see *In re Newdigate Colliery, Ltd., Newdigate v. the Company.* (3)
 v. [Sir R. Finlay, K.C., referred to *In re Thames Ironworks Co.,*
 SOVEREIGN *Farrer v. the Company* (4); *Forster v. Nixon's Navigation Co.,*
 BANK OF *Ld.* (5); *Moss Steamship Co., Ltd. v. Whinney.* (6)]
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Sir R. Finlay, K.C., Bicknell, K.C., and Geoffrey Lawrence,
 for the respondents, contended that the judgment of the Court
 of Appeal was right. There were concurrent findings of fact that
 the appellants purchased the paper in question from the receivers
 upon the terms that they were to be liable for the price to the
 receivers irrespective of any claim which they might have against
 the Imperial Paper Mills. The sale was not by the company, but
 by the receivers, and the moneys payable in respect thereof were
 not payable under the contracts subsisting between the appellants
 and the company. Moreover the claim of the respondents as
 assignees of the receivers arose entirely out of the sale and
 delivery of goods by the receivers and not out of the contracts
 with the company. The receivers were not parties to those
 contracts and declined to be bound by them and are not liable
 for any damages for breach thereof, which consisted entirely in
 not going on with them and not making deliveries thereunder.
 The evidence shewed that the appellants knew they were pur-
 chasing from the receivers upon terms arranged with them, and
 consented to take delivery of the goods ordered by them as
 separate contracts and not under the contracts with the
 company. The receivers were under no contractual obligations
 to continue deliveries. The contract of April 6, 1907, was referred
 to, and it was contended that the paper was supplied there-
 under. That paper, moreover, was not the property of the
 company, but of its bondholders, who through the receivers were
 mortgagees in possession; and the appellants had no right to
 obtain title to that property without payment therefor. Reference
 was made to *Moss Steamship Co., Ltd. v. Whinney* (6); *Burt, Boulton*

(1) (1888) 13 App. Cas. 199, 212,
 213.

(2) (1884) 9 App. Cas. 434.

(3) [1912] 1 Ch. 468.

(4) (1912) 28 Times L. R. 273.

(5) (1906) 23 Times L. R. 138.

(6) [1912] A. C. 254.

& *Hayward v. Bell* (1); *Reid v. Explosives Co.* (2); *Midland Counties District Bank, Ltd. v. Attwood* (3); *In re Newdigate Colliery, Ltd.* (4); *In re Thames Ironworks Co.* (5); *Boulton v. Jones* (6); Benjamin on Sales, 5th ed., p. 94.

Buckmaster, K.C., in reply.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. The appellants are paper merchants, and the respondents are bankers. The Imperial Paper Mills Company was incorporated under Ontario law in 1903. It has carried on the business of paper manufacture at Sturgeon Falls in Ontario, and has had numerous business contracts with the appellants from a date prior to October 27, 1906. A receiver and manager of the Paper Mills Company was then appointed by the Court in a debenture-holders' action, but the business relations with the appellants continued. On September 14, 1906, the Paper Mills Company had made an agreement with certain parties who included the respondents, under which the respondents and others, being already creditors, were to make certain advances for assisting the business of the company on the terms that the accounts for goods sold by the company should be hypothecated, and a certain supervision of the business should be established. On October 27, 1906, under the order already referred to, John Craig was appointed receiver and manager with liberty to continue the business in accordance with this agreement. By another order of January 9, 1907, George Edwards was appointed receiver and manager along with Craig, and they were given liberty to continue the business, but not to act as managers after June 1, 1907, without the leave of the Court.

At the date of the first appointment of the receiver and manager there were contracts for the supply of paper which were current between the appellants and the Paper Mills Company. These contracts were for the supply, periodically, of quantities of paper, and the contracts extended over considerable periods. The appellants' practice was from time to

(1) [1895] 1 Q. B. 276.

(2) (1887) 19 Q. B. D. 264, 266.

(3) [1905] 1 Ch. 357, 361.

(4) [1912] 1 Ch. 468.

(5) 28 Times L. R. 273.

(6) (1857) 2 H. & N. 564.

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time to send directions to the Paper Mills Company for the delivery of paper under the contracts. By notice in writing on June 17, 1907, the receivers and managers declared the contracts cancelled. Prior to this date, on June 14, the receivers and managers had assigned amounts due from the appellants for paper delivered to them to the extent of upwards of \$15,000 to the respondents. Notice of this assignment was for the first time given to the appellants on July 27. The respondents claimed these sums as due to them. The appellants replied that the company had broken its contracts, and that the appellants had suffered heavy loss, the amount of which they claimed to set against the sums due to the respondents. It appears to have been agreed in the Courts below that if the appellants were justified in this claim the amount of their damages exceeded what was due to the appellants. The question in this appeal is whether the claim of the appellants to set off the damages they had suffered was a good one. The answer to this question depends upon whether the appellants are able to establish that the goods delivered to them were delivered under the old contracts with the company, and not under new contracts made with the receivers and managers; for on the latter footing the debt assigned would not be a debt due to the company, and it could be assigned free from any claim for damages for breach by the company of its contracts. The Ontario statute which enables assignment of choses in action is in substantially the same terms as is s. 25 of the English Judicature Act, 1873, and enables such assignments to be made, but only subject to equities. No doubt a claim for damages for breach would be such an equity if it arose under the same contract, and the point in the case is therefore whether the appellants took the deliveries in respect of which the sums assigned were claimed under new and single contracts made with the receivers and managers, as to which there could be no such question of breach, or under the original contracts with the company for delivery over fixed periods, contracts which had undoubtedly been repudiated, and for breach of which the company was responsible.

In order to answer this question it will be convenient in the first place to look at the position in point of law of the receivers

and managers. A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs, with the result that some of its contracts, such as those in which it stands to an employee in the relation of master to servant, being of a personal nature, may, in certain cases, be determined by the mere change in possession, and the company may be made liable for a breach. But it does not follow that all the contracts of the company are determined even, to put the highest case, when a mortgagee acting under a power in his mortgage assumes control of the business of the mortgagor. The mortgagee may be in a position to say that he has authority to carry out in the name of the mortgagor contracts with a third person—e.g. for the manufacture and delivery of goods; and the third person may have no right to allege a breach on the ground of mere change of those who actually manufacture and deliver the goods for the company. Such a contract usually involves no stipulation as to the identity of those by whom the work of the company is to be performed, and the legal persona of the company may continue to subsist. In the present case the receivers and managers were by the terms of the orders of the Court obviously intended to carry on the actual business of the company with as little breach of continuity as possible; and there was no reason why they should not use the name and powers of the company for the purpose of fulfilling existing orders. It is no doubt true that *prima facie* any new contracts they made would ordinarily be made by them personally in reliance on their right of indemnity out of the assets, as happened in the recent case before the House of Lords of *Moss Steamship Co., Ltd. v. Whinney* (1), where a new contract made by the receiver was held, as matter of construction, to have been entered into by him personally. But in the present case the contracts were contracts entered into before the receivers and

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(1) [1912] A. C. 254.

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managers were appointed, and had been entered into in the ordinary course of the business of the company in manufacturing and delivering paper ; and there is, in their Lordships' opinion, no ground for presuming that the receivers and managers intended to act otherwise than in the name of the company to carry to a conclusion the business which was current, or that they meant to repudiate the obligations of the company. In the absence of a liquidation the persona of the contracting company remained legally intact though controlled by the receivers and managers.

When their Lordships turn to the evidence it appears to them that the course taken was to carry out the old contracts in this fashion. Mr. Craig states in his cross-examination the course of business :

Q.—“ Then at the time you were appointed receiver and manager on the 27th of October you found these other contracts ” (being those the subject of the appeal) “ that you have mentioned here in existence there in the books of the company ? ” A.—“ I found them there.” Q.—“ And you continued to ship paper under these as you had done before ? ” A.—“ There were certain orders that were there at the time which we filled, and then we received fresh orders from Parsons Brothers.”

The position of Mr. Craig must be borne in mind. He had been the managing director of the company, and under the financial agreement of September 14, 1906, already referred to he had been one of the three members of the committee of supervision and management. By the order appointing the receiver and manager he had been appointed on behalf of the debenture-holders, whose security included the entire undertaking and assets, but with liberty to continue the business pursuant to and in accordance with the agreement of September 14, and to borrow money for this purpose. It was apparently contemplated that the business should be carried on without change, and Mr. Craig himself took this view. For, replying to an inquiry from one of the appellants, he wrote on November 3, 1906 : “ The appointment of Mr. Tait and myself as receivers was made in a friendly application, and was for the purpose of carrying through the reorganisation

scheme. This was done with a view to prevent any creditor or bondholder from intervening and perhaps upsetting the arrangement unless he were bought out, and was done in the interests of the general body of bondholders and the creditors. There is not only no likelihood of the mills being shut down, but in this appointment every assurance that the mills will be run. The agreement made with the banks under which the mills have been running since the 15th September was confirmed by the Court and instructions given me to continue to act under it so long as seemed suitable to the receiver."

Mr. Craig's action was entirely in accordance with this view. He continued to treat the current contracts as in existence and to accept from the appellants a series of orders which specifically referred to these contracts and were based on the conditions as to price and delivery fixed by them. On January 10, 1907, Mr. Craig wrote a letter in which he raised the point that he was not bound to accept or fulfil the contracts of the company. But he intimated that he was unwilling to act on this view. He probably had in mind that if he did so the company might be wound up and the business destroyed. In a letter of March 23 he again refers to this power which, as in possession of all the assets, he doubtless possessed. On April 1 he defined the position still more precisely. He wrote that the receivers were not bound by any engagement prior to the order of October 27, 1906, and that they had accepted the appellants' subsequent orders only as single orders, and that the contracts made prior to that date were null. He asked for a remittance on account and threatened that if it were not made the appellants' orders would not be fulfilled. To save the situation the appellants, without in terms accepting his view, made a remittance, and the placing of orders continued. The receivers wrote again on April 6, 1907, that "regarding the position of contracts with us, we are filling the contracts simply and solely as single orders as they come in, and, while not legally bound to accept any more, we feel equally that we are not morally bound to do so in respect of our having filled some parts of them during the past few months. We certainly cannot possibly agree to confirm them subject to a four or six

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months' notice. The situation is such that we cannot guarantee to accept another specification. Each specification as it comes in will be accepted or rejected as if it were a new order independent of any contract. Further than this we cannot go. We may say that morally we do not feel at all bound to continue these contracts, as, had you been acting as agents for the mills and studied the mills' interests at the time these contracts were placed, and previous, we should have been in such a position with regard to orders that we should not have been asked by you to take them at all, nor would we have taken them had we been asked. As you are well aware we were forced into these contracts against our will. These contracts are now being considered by one of my co-receivers with a view to ascertaining what is the exact return to the mill. We do not seem to be getting the net return which was proposed to us, and on faith of which we, relying on your statements, accepted them as a company. If the general run of these shew out, by reason of your deductions and debits, to be less to the mill than the figures we supposed we were getting when the contracts were originally accepted, you may be perfectly certain that the balance of the orders will be cancelled. Your action in sending forward claims has had the effect of bringing this question up for consideration." On May 29 Mr. Craig again wrote, enclosing a formal letter in which the receivers asked to know what price the appellants would take to relieve the mill of certain of the current contracts, and adding that the suggestion was entirely without prejudice to the receiver's right of cancelling these contracts without paying any compensation whatever. In the covering letter, Mr. Craig wrote that he thought it would be good policy on the part of the appellants to relieve the mill of these contracts, and that he had been advised that it was not incumbent on the company to continue them beyond such time as would suffice to give the appellants reasonable notice, and that steps were likely to be taken to terminate these contracts not later than August 1.

The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, but to make it clear that they reserved

intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist. The receivers and managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the company and the appellants. The state of matters was one totally different from that in *Reid v. Explosives Co., Ltd.* (1), where the appointment by the Court of receivers and managers was held, having regard to the character of the contract in that case, which was one of personal service, to have put an end to it. As Fry L.J., however, points out in his judgment at p. 269, even in the case of contracts of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

Their Lordships think that the first repudiation that was made by the receivers and managers took place when the letter was written to the appellants on June 17, 1907, declaring the contracts cancelled. As the result, a right arose to counterclaim

(1) 19 Q. B. D. 264.

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against the company damages for breach, and neither the company nor its assignees could sue for the price of the paper delivered excepting subject to this counter-claim which was in existence when the notice of assignment to the respondents was given some time later, on July 30. It was agreed that, if this view was the true one, there could be nothing due to the respondents, by reason of the amount of the damage recoverable against the company exceeding the amount of the claim. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the action dismissed. The respondents must pay the costs here and in the Courts below.

Solicitors for appellants : *Rivington & Son.*

Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* JAMES LESLIE WILLIAMS DEFENDANT;
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AND
Nov. 19; CORNELIUS DELOHERY PLAINTIFF.
Dec. 10.
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Civil Service Act, 1884, Part V.—Public Service Acts of 1895 and 1902—Public Service (Superannuation) Act, s. 2 (b)—Construction—Rights of Officer in the Civil Service on Superannuation.

Under the provisions of Part V. of the New South Wales Civil Service Act, 1884, the respondent, an officer in the Civil Service, was entitled at any time after the age of sixty to retire therefrom upon the superannuation allowance provided by the Act and payable out of the fund constituted thereby. Such right is absolute and in the absence of express provisions in the Act cannot be conditioned on his giving notice to the Crown of his retirement, nor suspended during his membership of the Public Service Board under the Public Service Acts of 1895 and 1902 which he had accepted after retirement.

The superannuation fund having been exhausted :—

Held, that under s. 2 (b) of the Public Service (Superannuation) Act,

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1903, the allowances payable thereout should be paid from the Consolidated Revenue Fund.

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APPEAL from a judgment of the Supreme Court (December 6, 1911) refusing to set aside a verdict for 4428*l.* in favour of the respondent.

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The action was brought, in the circumstances stated in their Lordships' judgment, under the New South Wales "Claims against the Government and Crown Suits Act, 1897," to recover 5000*l.* from the Government of New South Wales for superannuation allowance under the Civil Service Act, 1884, and the Public Service Act, 1902, in respect of the period between May 16, 1900, and July 16, 1910.

The question decided was whether upon the true construction of the Civil Service Act, 1884, and the Public Service (Superannuation) Act, 1903, the respondent became in the said circumstances entitled to a superannuation allowance (*a*) as from May 16, 1900 (on which date he ceased to be a stipendiary magistrate, and was appointed a member of the Public Service Board at a higher salary), or (*b*) as from the date only (January 14, 1910) on which he ceased to be a member of the Public Service Board. The Government contended that the allowance should run from the later of these two dates.

There was no dispute at the trial as to the figures. It was agreed that if the respondent's claim was well founded the amount recoverable was 4428*l.*, being the amount of 458*l.* 4*s.* per annum from May 16, 1900, to the date of the issue of the writ, less a sum which had been paid into Court in respect of the period subsequent to January 14, 1910.

On August 30 the jury by the direction of Cullen C.J. returned a verdict for the said amount, leave being reserved to move the Full Court to set it aside and enter the verdict for the defendant or grant a new trial. The Full Court by a majority dismissed the motion.

Pring J., after stating that he entertained no doubt that when the plaintiff retired from the office of stipendiary magistrate on May 16, 1900, he retired from the service under s. 43 of the Civil Service Act, 1884, continued: "If that be so, it follows that on such retirement he had an immediate right to a

J. C. superannuation allowance and is entitled now to recover the
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 of an Act of Parliament.”

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With regard to s. 2 of the Public Service (Superannuation) Act, 1903, he held that the plaintiff came within sub-s. (b) and was entitled to be paid out of the Consolidated Revenue Fund and did not come within sub-s. (d).

Sly J. dissented and held that the verdict should be entered for the defendant. He considered that the plaintiff had not exercised his right to retire. “In my opinion he” (i.e., the plaintiff) “did not ‘retire from the service upon the superannuation allowance,’ but simply accepted in the place of his former position a position with a higher salary under the Crown, his former employer, though such new appointment might not be technically in the service referred to in the Civil Service Act of 1884. I am of opinion that the language of s. 43 of the Civil Service Act implies that there should be some act on the part of the officer intimating to the Crown that he is retiring upon his superannuation allowance because he is over sixty, and then the Crown could consider whether the officer was so entitled and could be aware of their responsibility to him for his allowance. . . . I think therefore that the plaintiff’s claim fails on that ground and it is not necessary to discuss the other grounds taken by the defendant.”

P. O. Lawrence, K.C., Austen-Cartmell, and Piddington, for the appellant, contended that the respondent did not on May 16, 1900, or at any date prior to the determination of his appointment to the Public Service Board retire from the Civil or Public Service of New South Wales upon a superannuation allowance. He had a right to retire under s. 43 of the Act of 1884, but he did not avail himself of the right. He accepted another appointment which was under the Crown even if it were not an appointment in the Civil or Public Service within the meaning of the Act of 1884 and subsequent Acts. While a member of the Public Service Board he never claimed an allowance in addition to his salary, and the evidence shewed that he accepted the position that until he finally retired from the

service of the State he was not entitled to be paid his pension. It accordingly was not payable when the Act of 1903 came into force, and s. 2 (*b*) of that Act did not apply. His case was specifically provided for by s. 2 (*d*), and his allowance only became payable on his ceasing to be a member of the Public Service Board. Till then he remained an "officer" within the meaning of the Act of 1884 and subsequent Acts and was not entitled to receive pay and pension at the same time.

Danckwerts, K.C., Drysdale Woodcock, and Delohery, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court of New South Wales dismissing by a majority (dissentiente Sly J.) an application on behalf of the Government asking in the alternative for a new trial, or for judgment in favour of the nominal defendant who is now appellant. The application was made pursuant to leave reserved at the trial of the action, when a verdict for 4428*l.* 0*s.* 9*d.* was entered for the plaintiff, Mr. Delohery, the present respondent.

Mr. Delohery was formerly an officer in the New South Wales Civil Service. He resigned his position in the service on accepting a seat upon the Public Service Board. That Board as now constituted was established by the Public Service Act of 1895, which was repealed and re-enacted by the consolidating Act known as the "Public Service Act, 1902." The duty of the Board, speaking generally, is to regulate, co-ordinate, and superintend in every detail the various branches of the Civil Service. It consists of three persons, each appointed for the term of seven years but eligible for reappointment. The salary attached to the office, or the "recompense," as it is called in the Act, is the sum of 1000*l.* a year, charged upon the Consolidated Revenue, a special appropriation for that purpose being made by the Act of 1895. A member of the Board may be suspended for a limited period by the Governor on various grounds specified in the Act, but no member can be removed from office without a resolution of each House of Parliament. Members of the Board are not Civil Service officers. The

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position of an officer in the service is incompatible with membership of the Board.

Mr. Delohery's claim in the action was for payment of arrears of the superannuation allowance payable on retirement to an officer in the Civil Service of the same standing as he was at the time when he left the service. It is common ground that no payment on that account was ever received or ever claimed by Mr. Delohery while he was a member of the Public Service Board.

The Government have met Mr. Delohery's claim most fairly. They have not raised any question of limitation or any question as to laches on Mr. Delohery's part. They desire, as their Lordships understand, that the question should be treated merely as a question of law.

The main contention on the part of the Government is that the allowance, if any, to which Mr. Delohery was entitled was in abeyance so long as he was in the service of the Government in any capacity, and that such allowance if payable merged in the salary he received as a member of the Public Service Board. At first sight there is an air of plausibility in that view, and certainly it seems to have been at one time Mr. Delohery's view as well as the view of the Government. The point in itself is a very short one. But the situation is complicated by the events which happened and by other matters—the failure of the fund constituted by the Civil Service Act, 1884, under the title of “the Superannuation Account,” the legislation consequent upon that failure, the attitude of Mr. Delohery himself, and the opinion expressed by Sly J., not disclaimed though not much relied on by the learned counsel who appeared for the appellant. It seems to their Lordships, in these circumstances, that the best way of meeting the various points which have been raised will be to consider the following questions in their order.

1. Did Mr. Delohery, on ceasing to be a member of the Civil Service, become entitled to a superannuation allowance from the Superannuation Account as constituted by the Civil Service Act, 1884?

2. If he became so entitled, was his right recognized and confirmed by the Government when the Superannuation Account

became exhausted and provision was made for the liabilities of that fund by the Public Service Superannuation Act, 1903?

3. If Mr. Delohery, on ceasing to be a member of the Civil Service, became entitled to a superannuation allowance, and if his right was recognized in the Act of 1903, was such allowance receivable by him while a member of the Public Service Board?

Under the provisions of Part V. of the Act of 1884, an officer in the Civil Service is entitled at any time after having attained the age of sixty years to retire from the service upon the superannuation allowance provided by the Act. The retiring officer is not required to do any act or to make any claim or to give any notice to perfect his right. His right under the Act of 1884 to the prescribed allowance is absolute on retirement. That is the view of the majority of the learned judges of the Supreme Court, and their Lordships agree in it. Under the Act of 1895 the right of officers in the same position as Mr. Delohery who might be continued in the service, as he was, for twelve months after the passing of the Act is preserved and confirmed.

On February 10, 1900, Mr. Delohery attained the age of sixty years. On May 16, 1900, he was appointed a member of the Public Service Board under the Act of 1895 for the statutory term of seven years. Under the Act of 1902 the existing members of the Board were continued in office as if they had been appointed under that Act. In January, 1903, Mr. Delohery resigned his office, apparently at the instance of the Government, and was at once reappointed for another statutory term of seven years. His appointment came to an end on January 14, 1910.

Sly, J., who differed from his colleagues, thought that the fact of Mr. Delohery having reached the age at which an officer was entitled to retire as of right "had nothing to do with his leaving the service." "He did not," adds the learned judge, "'retire from the service upon the superannuation allowance,' but simply accepted in the place of his former position a position with a higher salary under the Crown." The learned judge thought that there should be some act on the part of a retiring officer intimating to the Crown that he is retiring upon the superannuation allowance because he is over sixty. In the absence of

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such an intimation he came to the conclusion that Mr. Delohery was not entitled to be paid out of the Superannuation Account, and that on that ground his present claim failed, and the verdict should be entered for the defendant with costs. It may be observed that the strained construction which Sly J. places on the expression "retire upon" the superannuation allowance finds no support in the Public Service Act of 1895, where the right to the allowance is dealt with in one section and the right to retire at the age of sixty is dealt with separately in another. But it is enough to say that the learned judge seeks to qualify an absolute and unqualified right by importing conditions not to be found in the Act.

Passing to the next question it seems that the scheme of the fund represented by the Superannuation Account, which was formed substantially by a subvention from the Government and a deduction not exceeding 4 per cent. from the salaries of all civil servants, was financially unsound. There was to be an actuarial investigation every three years, and power was reserved to the Governor if the fund became insufficient to reduce allowances and gratuities pro rata. But in spite of these precautions, and in spite of the somewhat drastic provisions of the Act of 1895, it appears that in 1903 the fund was exhausted and the liability of the account for pensions paid by the Treasurer was largely in excess of its assets. In this state of things the Government came to the rescue and the Public Service (Superannuation) Act, 1903, was passed. The full title of the Act is significant. It is "An Act to provide that on the Superannuation Account becoming exhausted all amounts payable to and out of that account shall be paid to and out of the Consolidated Revenue Fund; to provide for the payment of certain superannuation allowances; and to otherwise amend the Public Service Act, 1902, and the Civil Service Act of 1884." It will be observed that in the full title a distinction is drawn between "amounts payable"—that is properly payable—out of the Superannuation Account "and certain superannuation allowances," as to which it may be inferred from the language used that there had been some irregularity, or at any rate that there had been or might be some question. It will be found that this

distinction which is accounted for by what had actually happened is preserved in the body of the Act.

Sect. 2 enacts that on a certificate being given by the Governor to the effect that the Superannuation Account was exhausted, which was duly given upon or shortly after the passing of the Act, certain provisions were to have effect. Of these only two require to be stated, sub-s. (b) and sub-s. (d).

Sub-s. (b) is in these words: "All superannuation allowances payable under the Civil Service Act of 1884 and the Public Service Act, 1902, to any persons shall continue to be paid to such persons in accordance with the provisions of the said Acts but shall be paid from the Consolidated Revenue Fund."

It was argued that Mr. Delohery was not entitled to the benefit of that sub-section inasmuch as the expression "shall continue to be paid" was inapplicable to a case where no payment at all had been made. But the learned counsel for the Crown conceded that those words were not to be taken so literally as to exclude a contributor to the fund who might have retired on a pension but happened to die before the first instalment was actually paid. It seems to their Lordships that that concession destroys the argument on the part of the Crown, for if in the one case regard is to be had to the right and not to the actual fact of payment, there is no reason why a person who is entitled but for some reason or other neglects to receive payment should be in a worse position than a person whose death prevents any payment being received by the annuitant. The sentence is no doubt awkwardly expressed, but it is to be observed that the subject of the sentence is "all superannuation allowances payable under the Civil Service Act of 1884 and the Public Service Act, 1902." There is no change in the subject of the sentence from first to last, and the final words of the sub-section where the predicate is found declare that all allowances which are the subject of the sentence "shall be paid from the Consolidated Revenue Fund." Probably at the time there was widespread uneasiness felt by members of the service and especially by those who had retired on pensions. The words interposed between the first words of the sentence and the last were probably introduced in order to assure all persons in receipt of pensions that things

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would go on just as they were meant to go on under the Act of 1884, without any diminution in the scale of payment or any levy or stoppage to make good any existing deficiency. Possibly the words "payable and shall be paid" have dropped out after the words "continue to be." At any rate in their Lordships' opinion the meaning is the same as if those words were supplied.

Sub-s. (d) is in these words: "Every person who having been in the Civil Service had a superannuation allowance computed or assigned at any time before the commencement of this Act consequent on his acceptance of another office under the Crown which he now holds, but who is not receiving such allowance shall, upon retirement from such office, be paid from the Consolidated Revenue Fund such allowance in accordance with the provisions of the Civil Service Act of 1884, and the Public Service Act, 1902."

In their Lordships' opinion sub-s. (d) does not apply to the case of any person whose right to a superannuation allowance is absolute under the Act of 1884. It applies to a very limited class of persons members of the Civil Service not entitled to retire on a superannuation allowance who were employed in some other department by the Government of the day under a promise (for which there was no statutory authority) that their rights under the Civil Service Act should be preserved. "It has been the practice," says the Attorney-General in a memorandum of October 16, 1899, "when an officer left the Civil Service to take up some other public position for the Executive as an act of grace to allow him to retain such rights under the Civil Service Act as had accrued at the time of his ceasing to be a member of the Civil Service." Then the Attorney-General gives instances and advises the Cabinet that promises of that sort exceeding the Executive Minute have no legal validity, but recommends that in order to preserve continuity of administration engagements made in the past to that effect should be validated. So far as can be gathered from the statutes to which their Lordships have been referred there is no such thing required by law as the "assigning of a pension" in the case of a person entitled as of right to a retiring allowance. It seems to their Lordships that Mr. Delohery was mistaken in thinking it necessary to apply for "an

assignment" of his pension when the Bill for the Act of 1903 was in progress.

There remains the last question: Was Mr. Delohery's retiring allowance in abeyance while he was a member of the Public Service Board? Their Lordships think that it was not. In order to take away a right given in clear terms by statute or to suspend such a right there must be found in the words of the Legislature a provision to that effect equally clear. There is no such provision in the Civil Service Acts in force while Mr. Delohery was a member of the Service. Such a provision would seriously hamper the choice of the Executive in filling a very difficult and responsible office.

In the result their Lordships are of opinion that the appeal must be dismissed, and their Lordships will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Light & Fulton.*

Solicitor for respondent: *J. H. Galbraith.*

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J. KERR WILSON DEFENDANT;

AND

CORPORATION OF DELTA PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

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Nov. 26;
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Law of British Columbia—Municipal Act, 1892, s. 146—Municipal Clauses Act, 1897, ss. 243, 244—Construction—Validity of Municipal By-laws—Validity of Municipal Debentures—Limitation.

By the British Columbia Municipal Act, 1892, s. 146, a municipal by-law under which debentures have been issued, and the interest thereon paid by the municipality for a year or more, cannot be invalidated or set aside on any ground whatever. And ss. 243 and 244 of the Municipal Clauses Act, 1897, bar any cause of action within one

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year from the date thereof in respect of deviations by the municipality from the general plan of any public works authorized by its by-laws.

Such deviations are justified when they are incidental to the carrying out of the authorized works and are made with a view to diminish unnecessary inconvenience and resulting claims to compensation.

APPEAL from a judgment of the Court of Appeal (April 10, 1911) affirming a judgment of Hunter C.J. (June 8, 1909).

On July 11, 1902, the respondents sued to recover certain dyking dues in respect of certain lands of the appellant known as Lots 83, 84, 128 and 129. Their action was dismissed and they did not appeal. The appellant counterclaimed that the respondents had constructed a ditch and embankments through his lands, conducting thereby a large quantity of water thereon by reason whereof the appellant's lands were continually flooded. Also that after construction of the ditch and embankments from time to time the respondents had placed obstructions in the ditch, thereby impeding the natural flow of water in the ditch to the continued damage of the appellant's lands. He claimed consequential relief and damages.

The respondents denied the allegations and pleaded the Statute of Limitations, R. S. B. C., c. 123, s. 3, and c. 144, ss. 243 and 244. The works are described in their Lordships' judgment and were completed in July, 1897. The municipal by-law which authorized them was passed on October 5, 1895. Thereunder the respondents issued debentures of the corporation for the amount required and paid the interest thereon to the time of action. On April 10, 1897, under powers conferred upon them by the Municipal Clauses Act, 1896 (59 Vict. c. 37), ss. 252, 253, they adopted a by-law amending that of October 5, 1895, under which further debentures were issued and the interest paid. On September 18, 1900, a further by-law was adopted under s. 263 of the Municipal Clauses Act, 1897, R. S. B. C. (61 Vict. c. 144), under which further debentures were issued and the interest paid for the purpose of maintaining and repairing the said works as directed by s. 261 of that Act.

The appellant's counter-claim was dismissed by Martin J., but on appeal was sent back for a new trial. In the result Hunter C.J. dismissed it, holding that whether there were any

irregularities in the by-laws or not the appellant was prevented from attacking them by the curative sections relied on by the respondents, namely, Municipal Act, 1892 (55 Vict. c. 33), ss. 145, 146, and 146A, and Municipal Clauses Act, 1897 (61 Vict. c. 144), s. 107. He further held without finding that the appellant had sustained any damage that his remedy, if any, was by arbitration, since the respondents had not acted ultra vires. In appeal Macdonald C.J. and Gallihier J. (Irving J. dissenting) held that the appellant had acquiesced in what the respondents had done and was thereby estopped from suing. The Courts below did not decide on the plea of limitation.

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Joseph Martin, K.C., for the appellant, contended that the curative sections relied on but not pleaded only refer to debentures issued under a by-law, and that the by-law is only validated thereby so far as it affects debenture-holders and is not validated as against the holders of property. Sect. 279 of the Act of 1892 is the only section which deals with questions arising between property owners like the appellant and the corporation. That section does not avail the respondents, for the condition precedent required thereby, that is the compliance with provisions for promulgation prescribed by s. 278, was not shewn to have been complied with. With regard to procedure by arbitration it was contended that the illegality of the by-law must be decided by a Court of law, and that ss. 269 and 285 of the Act of 1892 only apply to cases where the right of the municipality to carry out the works is admitted and only the assessment of damages has to be provided for. It was further contended that the limitation sections of the Act of 1897, ss. 243 and 244, did not apply, for the water scheme of the respondents caused the damage and was not authorized by any statutory authority and could not be regarded as part of the authorized dyking scheme. It involved deviations and variations therefrom which could not be justified by the authority given. Reference was made to *Lindsay Petroleum Co. v. Hurd* (1) and *Corporation of Raleigh v. Williams*. (2)

Sir R. Finlay, K.C., W. J. Taylor, K.C., and Hugh S. Bompas,

(1) (1873) L. R. 5 P. C. 221.

(2) [1893] A. C. 540, 550.

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for the respondents, relied on the curative sections above referred to as validating the by-laws in question, assuming that there had been any irregularities in passing them. The evidence shewed that the works complained of had been properly executed thereunder, had been executed with the acquiescence of the appellant, and had not caused any damage to his property, but on the contrary had benefited it. If the appellant had sustained any damage by reason of any negligence in construction for which the respondents were responsible he should have proceeded by arbitration. The works as carried out were shewn to have been authorized by the by-laws, either expressly or as incidental to and necessary for the proper carrying out of the same according to the plan and intention thereof. The appellant's action, moreover, was barred by the limitation sections, 243 and 244, of the Act of 1897 as amended by s. 32 of the amending Act of 1900 (c. 23).

Joseph Martin, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing an appeal from the judgment of Hunter C.J. upon a counter-claim by the appellant in an action brought against him by the respondents. The appellant is a landowner at Delta, New Westminster, in the Province of British Columbia, and the respondents are the municipal corporation of that place.

The counter-claim relates to certain dyking works executed by the respondents along the south bank of the Fraser River which forms the northern boundary of certain lands of the appellant. These works run through the lands of the appellant as well as through neighbouring lands lying upon the same bank, and were constructed for the purpose of keeping back the waters of the Fraser River at times when it is high and thus preventing them from flowing over such lands, and it is admitted that they successfully accomplish this object.

By his counter-claim the appellant claimed damages against the respondents on two grounds. In the first place he alleged that the dyke and the works appertaining thereto (more especially

a certain ditch running along by the side of the dyke) were constructed illegally and caused damage to his land by overflow. In the second place he alleged that the defendants after constructing the dyking works under certain specific by-laws neglected to maintain them and keep them in repair and so caused damage to him. No evidence seems to have been given at the trial to support this latter claim, and no reference was made to it on the hearing of this appeal, so that it is unnecessary to make further reference to it.

Shortly stated the facts of the case are as follows: Prior to 1895 the Fraser River used to overflow its banks from time to time and flood the neighbouring lands, thereby rendering portions of them, including those to which this case refers, incapable of cultivation and practically of no value.

In January, 1895, a petition was presented to the respondents by which they were asked to pass the necessary by-law to provide for the construction, protection, and maintenance of a dyke along the south bank of the Fraser River from the high land to the Gulf of Georgia in order to prevent these overflows. In consequence of this petition the respondents passed a by-law to authorize the construction of the works in question and to provide the necessary moneys. Such by-law was provisionally adopted on June 10, 1895, and finally passed on October 5, 1895, and on January 13, 1896, the respondents entered into a contract for the construction of the works. In January, 1897, it was discovered that the sum of money so provided would be insufficient to complete the works, and accordingly a further by-law was passed by the respondents authorizing the raising of the requisite further money. This by-law was provisionally adopted on April 10, 1897, and finally passed on May 22, 1897. The money authorized by the said by-laws was raised by debentures of the respondent corporation bearing interest at the rate of 5 per cent. per annum. No application has been made at any time to quash either of the said by-laws or to set aside any of the debentures issued thereunder, and interest has been paid upon those debentures regularly to the present time. The works were completed in July, 1897.

At the date of the petition for the original by-law above

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referred to the appellant was the owner of lands in the area to be protected by the works, known as Lots 83 and 84, and as such owner he signed the petition for the by-law. In November, 1897, after the works had been completed, he purchased certain other lands known as Lots 128 and 129, which are the lands to which his counter-claim refers. During the years 1898 and 1899 he was a member of the council of the respondent corporation. Shortly after his ceasing so to be a member the respondents passed a further by-law authorizing the borrowing of a further sum for the purpose of keeping the works in a proper state of repair. Such by-law was finally passed on September 18, 1900, and debentures were forthwith issued under it. As in the case of the other by-laws no application has ever been made to quash this last by-law or set aside the debentures issued under it, and interest has been paid upon those debentures regularly to the present day. The appellant had from the first full knowledge of all things done by the respondents as above set forth, and no objection was at any time raised by him to anything that had so been done until the filing of the counter-claim to which this appeal relates.

On July 13, 1902, an action was brought by the respondents against the appellant for arrears of taxes due from the appellant as owner of the said lands in respect of the assessment of those lands under the said by-laws. Beside putting in a defence the appellant raised a counter-claim for damages and an injunction. The action was tried in the year 1902 before Martin J., who dismissed both the claims, but on appeal the case was sent back for a new trial. Thereupon the appellant amended his counter-claim, and in its present form it was delivered on July 31, 1905. The second hearing of the action took place on October 30, 1905, before Hunter C.J., who dismissed the claim of the respondents on the ground that they had adopted the wrong remedy for the non-payment of the taxes. He held that such taxes could only be recovered by enforcing the statutable lien on the lands in respect of them. Against such judgment no appeal has been brought. He also dismissed the counter-claim. The present appellant appealed against this judgment so far as it related to the counter-claim, and the Court of Appeal by a majority

supported the judgment of Hunter C.J. From this judgment the present appeal is brought.

For the purposes of the present appeal it will suffice to say that the works in question consist mainly of a dyke reaching along the south bank of the Fraser River. This dyke has of necessity a ditch running along it on the side away from the river so as to conduct away the water which otherwise would have drained into the river from the protected lands at such times as the river might be at a sufficiently low level to receive such drainage. There are, however, two so-called sloughs in this portion of the Fraser River. The upper slough, known as the Crescent Slough, is a kind of by-pass which leaves the river and returns to it and thus encloses an island of considerable size known as Crescent Island. The second slough, known as the Chilukthan Slough, is in reality a small arm of the river flowing into the Gulf of Georgia by an independent opening. Both these waterways were admittedly of great utility to the lands through which they flowed as well as to the lands lying adjoining thereto for the purpose of watering cattle. In order to preserve these waterways without interfering with the protective action of the dyke, openings were made through the dyke at the junctions of the sloughs with the river, and these openings were protected by flood-gates, which could be opened at times when the river was at such a level that this could be done without injury to the adjacent lands. To make the protection complete it then became necessary to insert in the ditch at its intersection with the sloughs apparatus known as ditch boxes, so that the ditch might be protected from the inflow of river water during such periods as the flood-gates were opened. In addition to these special arrangements, at the points where the works crossed the sloughs certain dams and flood-gates were constructed in the works at points where the dyke passed across the lands of two owners who had themselves previously established protective works. Their Lordships are satisfied that all these variations in the general plan of the works were incidental to carrying out the authorized works and were fully within the powers of the respondent corporation in the performance of their duties under the by-laws. It is the duty of the public body

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entrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected by the works, and where local adjustments and variations of the general plan can be made without affecting its suitability for its intended purpose or its de facto compliance with the description of the works authorized, it is right to make them if they diminish the interference with the convenience of individuals and so lessen the amount of compensation to which they would become entitled. In each particular case the propriety of such special variations will be a matter dependent on the facts of that case, but in the present case the evidence both as to the works themselves and the conduct of the parties satisfies their Lordships that there is no ground for doubting that whatever was done was fully justified by the surrounding circumstances.

The main argument for the appellant in the argument before their Lordships was directed to shew that the by-law was invalid because of certain irregularities in the procedure for obtaining it.

Their Lordships have no doubt that the matters urged upon them in this behalf are immaterial. In view of the disastrous consequences which would ensue if the validity of a by-law of this type could be challenged long after action had been taken upon it, the Legislature of British Columbia has in the Municipal Act, 1892, enacted that all objections to such by-laws must be made promptly and within a very short period of its being passed. In this connection, ss. 146, 146A, 278, and 279 may be instanced, all of which apply to the present case and secure the by-laws in question from all attack.

Sect. 146, which may be taken as an example, reads as follows:—Sect. 146.—“When debentures have been issued under a statute or under a by-law and the interest on such debentures and the principal of such thereof (if any) as shall have fallen due has been paid for the period of one year or more by the municipality, the statute and the by-law and the debentures issued thereunder or such thereof as may yet be unpaid, shall be valid and binding on the corporation and shall not be quashed or set aside on any ground whatever.”

It was suggested on behalf of the appellant that the effect of

this section was limited to the validation of the debentures issued. Their Lordships can see no ground for this contention. The section provides plainly that under circumstances which are admittedly to be found in the present case "the statute and the by-law shall be valid and shall not be quashed on any ground whatever."

For these reasons it is wholly unnecessary to inquire whether the contentions of the appellant as to the existence of irregularities in the procedure for obtaining the by-laws are well founded or not.

The remainder of the argument on behalf of the appellant was based on the contention that the works were not justified by the by-laws. As has already been stated, their Lordships are of opinion that this contention is not justified in fact. But their Lordships are also of opinion that the claim, so far as it is based on this ground, is barred by the provisions as to limitations of action contained in the Municipal Clauses Act, 1897, ss. 243 and 244. It is not necessary to decide under which of these two sections the suggested right of action would come, because the acts complained of were all done before August, 1897, and the counter-claim was not put in until August, 1902. The longest period allowed by ss. 243 and 244 is one year after the cause of action has arisen, and this period had therefore elapsed long before the action was brought. As will be seen by the counter-claim, the appellant claimed an injunction to prevent the respondents from maintaining and working the apparatus complained of, and that cause of action, if it ever existed, must have first arisen in July, 1897. There is no suggestion here that the respondents have acted otherwise than bona fide and with the greatest openness, and it is clear that everything relevant to such a ground of action was fully known to the appellant from the first. Without in any way deciding whether or not the appellant might have any rights in this or any other form of action had such not been the case, their Lordships have no doubt that under such circumstances cases like the present are precisely the cases to which these provisions for limitation of actions in the case of municipal corporations are intended to refer, and that the plaintiff's cause of action based on alleged deviations by the respondents

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from the works contemplated by the by-laws is barred by these provisions.

The above considerations suffice to decide this appeal. But in addition thereto there is in their Lordships' minds grave doubt whether the appellant has proved that he has suffered any damage in fact or in law. It is admitted that his land has been greatly benefited by the works, and when analysed his sole complaint is that if the respondents in working the ditch constantly kept the level of the water in it sufficiently low he would have facilities of drainage of his lands which he does not now possess. Their Lordships see no obligation on the respondents so to work the ditch. Had they thought it proper, there was nothing to prevent their establishing weirs in the ditch which would have maintained such level in each section of the ditch as they thought proper, and in fact the effect of the ditch boxes and dams is of this nature. It would seem, therefore, that no legal right possessed by the appellant has been infringed by the actions of the respondents, and although their Lordships do not feel called upon to decide the question, they think it proper to put on record that they are not satisfied that any damage has been proved. Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed and that the appellant be ordered to pay the costs.

Solicitors for appellant : *Charles Russell & Co.*

Solicitor for respondents : *F. G. Evans Jones.*

[PRIVY COUNCIL.]

MICHAEL KELLY AND ANOTHER PLAINTIFFS; J. C.*
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 C. H. ENDERTON AND OTHERS DEFENDANTS. Dec. 13, 17.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Agreement to give an Option to Purchase and also a Commission on Sale—
 Construction.*

On March 11, 1911, the appellants agreed to give the respondents an option to purchase on specified terms the properties in suit, and also agreed to pay them a commission on sale and to close the sale by deed and mortgage. The respondents duly exercised this option in favour of S., to whom the deed and mortgage were executed.

In a suit by the appellants to set aside the transaction and recover the property sold on the ground that they had subsequently discovered that S. was a clerk in the office of the respondents, the latter being the real purchasers, but disqualified as being agents for sale:—

Held, that the respondents were not merely agents to sell. An option to purchase was given to them in plain and unequivocal terms, and the subsequent clause as to a commission was not inconsistent therewith.

Livingstone v. Ross [1901] A. C. 327, distinguished.

APPEAL from a judgment of the Court of Appeal (May 20, 1912) affirming a judgment of Mathers C.J. (February 5, 1912).

The action was brought on October 27, 1911, to set aside a sale of certain real property in Winnipeg, effected under a contract set out in their Lordships' judgment and called Exhibit 2, on the ground that the plaintiffs had been deceived as to the identity of the purchasers.

The plaintiffs contended that Exhibit 2 was nothing more than an agency agreement and came within the principle of *Livingstone v. Ross* (1), and that the sale should be set aside because of the non-disclosure by the defendants' firm that they being agents to sell were the real purchasers.

Both the above Courts held that as a matter of fact the

* *Present*: VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, and LORD MOULTON.

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respondents were not the purchasers, but that the sale had been made to the respondent Russell and that the plaintiffs were not entitled to set it aside.

Sir R. Finlay, K.C., J. E. O'Connor, K.C., and R. O. B. Lane, for the appellants, contended that Exhibit 2 was a mere grant of an agency to sell, and that the respondents were bound in acting thereunder on behalf of the appellants to make a full disclosure of all material facts. This they had not done, and had secretly purchased themselves in a manner inconsistent with their duty as agents for the vendor. On the construction of Exhibit 2 they referred to *Livingstone v. Ross* (1); *Lewis v. Hillman* (2); *Gordon v. Street*. (3)

Buckmaster, K.C., A. J. Andrews, K.C., and Geoffrey Lawrence, for the respondents Enderton & Co. and Russell, were not heard.

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The judgment of their Lordships was delivered by

LORD DUNEDIN. The appellants in this case, Messrs. Kelly, were proprietors of some ground in the city of Winnipeg. They were approached by a person of the name of Russell, one of the defendants to the action, with a view to procuring an option of the purchase of the property. Russell at first made a proposal for an option in favour of a person called Bell on certain terms. The negotiations were abortive. He subsequently procured from the Kellys a document which has been called Exhibit 2, and which was in these terms: "We, Martin and Michael Kelly, of the city of Winnipeg, gentlemen, in consideration of one dollar, for which we hereby acknowledge receipt, agree to give C. H. Enderton & Co., the option to purchase Lot eight hundred and eighty-nine (889), Block 3, according to a map or plan of part of Lot (one) 1 of the parish of Saint John, being in the city of Winnipeg, in the Province of Manitoba, registered in the Winnipeg Land Titles Office as plan No. 129, for the sum of seventy thousand four hundred (70,400.00) dollars on the following terms:—Twenty-five thousand dollars cash on completion of

(1) [1901] A. C. 327, 334.

(2) (1852) 3 H. L. 607, 629, 630.

(3) [1899] 2 Q. B. 641, 647.

title papers, and the balance, forty-five thousand four hundred (\$45,400) as follows: Thirteen thousand two hundred dollars (\$13,200) in two consecutive payments on the fifteenth day of March 1912 and 1913, and the balance the purchaser to assume in a mortgage which is now on the property, dated on or about the first of October 1910, which is payable twice yearly; one thousand dollars of principal and interest at six per cent. (6⁰/₁₀₀) per annum. This mortgage expires on the first day of October 1915. Deferred payments to bear interest at 6 per cent. per annum. Taxes and rents to be adjusted to date of purchase. We hereby agree to pay one thousand dollars commission to C. H. Enderton & Co. on sale of above described property on the above described terms. This option is to expire at six o'clock in the afternoon of Wednesday the fifteenth day of March 1911. We hereby agree to close this sale by deed and mortgage."

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This was signed by the Kellys on March 11.

On March 15, the day of the expiry of the option, Messrs. Kelly received a letter from Messrs. Andrews, a firm of solicitors in Winnipeg, in the following terms:—"We beg to advise you that Messrs. C. H. Enderton & Co. have placed in our hands \$24,000.00 cash in order to carry out the terms of the option given by you to them expiring at six o'clock P.M. this day, for the sale to that firm of Lot 889, Block 3, according to a map or plan of part of Lot one (1) of the parish of St. John, being in the city of Winnipeg, in the Province of Manitoba, registered in the Land Titles Office as plan No. 129; said firm of C. H. Enderton & Co. have also placed in our hands the necessary funds to make the adjustments of taxes and rents as provided in the option, and we now notify you on behalf of the said firm of C. H. Enderton & Co. that they are now ready and willing to make the purchase of the said property on the terms set out in the said option, and that they are ready to close the matter out with you at any time to-day that you may be ready. We are now preparing the mortgages from the purchaser, and will have same ready for delivery over in exchange for deed of transfer. If you have any solicitor acting for you in the matter, kindly advise us, so that no delay may occur in having the matter closed out."

Following upon this, the money, so far as due, was duly paid,
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and the name of one Simpson was given as the person in whose favour the conveyance was to be made. The conveyance was executed and the mortgage by the purchaser was executed.

The plaintiffs allege that they subsequently discovered that Simpson was a clerk in Enderton's office, and that the true purchasers were the Endertons themselves. They bring this action to set aside the conveyance and recover the property upon the ground, first, of false representations by Russell, and second, upon the ground that the sale being truly to Endertons, which fact was concealed from them, was bad, in respect that no agent to sell can bind his principal to sell to himself, the agent.

As regards the first ground of action, the false representation is said to consist in this, that in the course of the negotiations the plaintiffs asked Russell whether there was anything doing in Portage Avenue, meaning thereby whether there were any other property transactions going on in the neighbourhood where this property was situated, and that he said "No," whereas in point of fact he knew that the Endertons, for whom he was really acting, had been buying other pieces of property there.

It is enough as to this to say that the trial judge came to the conclusion that the false representation, which was denied by Russell, was not in fact made; and that, as this depends solely on the credibility of Kelly on the one hand and Russell on the other, their Lordships would be slow to come to a different conclusion. Even if the question had been so asked and so answered, they think that a general communication of this sort between parties at arm's length, and where there was no duty of disclosure, would fall short of that specific misrepresentation *in causam contractui* which would be ground for rescission. They say "between parties at arm's length" because, be it observed, in this branch of the case, the plaintiffs must treat Russell as the agent of Enderton & Co. to obtain the contract contained in Exhibit No. 2.

As regards the second ground of rescission, the defendants deny that Simpson was a mere *prête-nom* for Enderton & Co., but the inquiry whether that is so is needless unless the contract contained in Exhibit E is a mere contract of agency and not a contract under which Enderton & Co. had a right to purchase

for themselves. It therefore becomes necessary to consider first of all what is the true import of the document Exhibit 2.

Now, *prima facie*, the undertaking is exceedingly clear. The Kellys bind themselves to give Enderton & Co. the option to purchase on certain terms. The only argument that can be found in favour of this being anything but an option is the clause near the end: "We hereby agree to pay one thousand dollars commission to C. H. Enderton & Co. on sale of above described property on the above described terms." It is said that this shews that the agreement is not an agreement for sale on option, but is a mere agency agreement.

Their Lordships are unable to accede to this contention. The option to Enderton to buy is given in plain and unequivocal terms, and it would require to be shewn that the subsequent clause as to commission was necessarily inconsistent with an option to buy to induce them to construe the clause in other than its natural way. But where is the inconsistency? It seems quite a natural thing to say "You are to have an allowance of commission of one thousand dollars for finding a purchaser who is able to pay the twenty-five thousand dollars cash and come under the further obligations, and that whether you are yourselves the purchasers or you give the benefit of the option to another purchaser."

Their Lordships are referred to the case of *Livingstone v. Ross* (1), where an agreement was held to be a mere agreement of agency and to give no right to the agent to enact himself as purchaser. Obviously each agreement must be judged of according to its own terms, and they think the distinction between the agreement in that case and in this is obvious and vital. In that case no option in favour of Livingstone was expressed; and the opinion of the Board is expressly rested on the fact that, if sale on option and not agency had been intended, such option would have been expressed by the insertion of the words "to you" after the words "We offer to sell." The expression "to you" was indeed employed in an ancillary clause dealing with timber on the ground; but it was held that this could not supply the crucial omission just mentioned. In this case, as already mentioned, the offer to sell to Endertons by name stands in the forefront of the

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J. C. contract. Further, in that case, the moment that Livingstone
1912 assumed to accept, Ross at once repudiated that view of the
KELLY agreement. Here there is neither challenge nor repudiation of
r. the letter of March 15, and the conveyance for which the only
ENDERTON. warrant was the offer contained in Exhibit 2, and the acceptance
— in the letter of March 15, was duly executed in favour of Enderton
& Co.'s nominee.

This being their Lordships' view of the construction of the contract contained in Exhibit 2, it becomes unnecessary to consider whether Simpson is really an independent assignee of Enderton & Co., or whether he truly holds as a trustee for them. Their Lordships are therefore of opinion that the result to which the trial judge and the Court of Appeal came was correct, and they will humbly advise His Majesty that this appeal ought to be dismissed.

The respondents Enderton & Co. and Russell will have their separate costs of the appeal, and the respondent Simpson will have such costs as he may be entitled to.

Solicitors for appellants: *Capron & Co.*

Solicitors for Enderton & Co. and Russell: *Blake & Redden.*

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[HOUSE OF LORDS.]

LIVERPOOL CORPORATION APPELLANTS; H. L. (E.)*

AND

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MITTEE AND WITHNELL OVERSEERS } RESPONDENTS.1913
}
Feb. 3.*Poor Rate—Rateable Occupation—Owner in Possession of Land used as
Gathering Ground for Waterworks.*

A municipal corporation owned certain reservoirs and waterworks and received into their reservoirs the water which flowed from an adjoining gathering ground. In order to prevent pollution of the water flowing from it to their works the corporation purchased the gathering ground, which consisted of agricultural land and moorland. They thereupon demolished certain farmhouses on the land, abolished certain rights of pasturage and turf cutting thereon, and limited the user of the land to purposes of sporting and afforestation. They planted a portion of the land with trees, converted another portion into nurseries, and let the sporting rights over the land to a lessee for a term of years, but they did not exercise any other acts of occupation over the land:—

Held, that the corporation were in rateable occupation of the whole of the land as a gathering ground.

Dictum of Lord Mansfield in *Rex v. St. Luke's Hospital* (1760) 2 Burr. 1053, at p. 1064, considered.

Order of the Court of Appeal [1912] 1 K. B. 270, affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of the Divisional Court upon a case stated by the Court of Quarter Sessions for the county of Lancaster. (2)

The appellants were owners and occupiers of a system of reservoirs and waterworks known as the Rivington Waterworks. They appealed to quarter sessions against a poor rate for the township of Withnell made on April 27, 1909. The only material question upon the appeal was as to an assessment made upon the appellants in respect of a tract of land (1165 acres in area) forming part of the gathering ground of the appellants' waterworks. The appellants in the first instance

* *Present*: VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1912] 1 K. B. 270.

(2) [1911] 1 K. B. 1057.

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owned only the land occupied by their reservoirs and works, and by virtue of such ownership they received into their reservoirs and works the water which flowed naturally from this gathering ground, including the land in question in the appeal (hereinafter called "the said land"). They feared that so long as the gathering ground was owned by persons other than themselves they might not be able to prevent pollution of the water flowing from it to their waterworks. They therefore bought the greater part of the gathering ground. The said land (the 1165 acres) was bought by agreement at a price amounting to 26*l.* 10*s.* per acre. Other parts were subsequently bought by agreement or under compulsory powers at various prices, e.g., in one case 76*l.*, in another 409*l.* per acre, the average cost of the whole area of about 10,000 acres, including the said land, being 45*l.* per acre. The said land when bought by the appellants consisted partly of agricultural land with farmhouses and buildings on it, and more largely of moorland. In order to reduce the population and the cattle on the said land and so diminish the risk of pollution of the water flowing therefrom, the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon and abolished certain rights of pasturage and turf cutting which had previously been enjoyed thereon and limited the user thereof to purposes of sporting and afforestation. They planted 297½ acres of this land with trees for improving the shooting, and they utilized 8½ acres as a nursery for young trees, and they enclosed the planted area in a ring fence. The remainder of the land, 859 acres, was moorland already enclosed with a fence when the appellants bought it. They made a few grips in the planted area for the purpose of adapting it for plantations. The water from the grips flowed naturally like the rest of the water on the said land to the appellants' waterworks. The sporting rights over the said land and also certain other lands of the appellants were let by them under a lease dated March 16, 1906, for four years from December 11, 1905. The lease contained covenants by the lessee (inter alia) duly and regularly in every year of the said term to burn a portion of the old ling or heather on the moorlands of the demised premises, if weather suitable, at the time

and in the manner therein mentioned, to the satisfaction of the appellants, and to keep and maintain all shooting butts and stands and walls in good and substantial repair to the satisfaction of the agent of the appellants. The lessee was rated in respect of the sporting rights. The lessee's gamekeeper, acting with the authority of the appellants, warned trespassers off the land. Since the purchase of the land by the appellants trespassers had been more rigorously excluded from the land than before. Save as aforesaid there was no evidence that the appellants had performed any outward acts of occupation on the said land. It was admitted by the appellants that they were in rateable occupation of so much of the said land as was used by them for plantations or nurseries, but they contended that they were rateable in respect of their plantations and nurseries only at their value as such under s. 4 of the Rating Act, 1874, and not on the basis of their having an enhanced value as a gathering ground for their water undertaking. In regard to the moorland they contended that they were not in rateable occupation thereof and that it was unoccupied except so far as it was occupied by the sporting lessee, who was duly rated in respect of such occupation.

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The Court of Quarter Sessions held :

1. That the appellants were not in rateable occupation of the said land with the exception of the parts used by them for plantations and nurseries. 2. That the plantations and nurseries should be assessed under s. 4 of the Rating Act, 1874, at 2s. per acre and 15s. per acre respectively. 3. That the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for plantations and nurseries.

The questions for the Court were whether on the evidence before them the three above-mentioned decisions of the Court of Quarter Sessions were right in law.

The Divisional Court (Lord Alverstone C.J. and Hamilton and Avory JJ.) held that the appellants were in rateable occupation of the whole of the 1165 acres, and that upon that view the second and third questions were immaterial, if and so far as the plantations and nurseries were part of the gathering ground; but if and so far as they were not so part, the Court agreed with

H. L. (E.) the decision of the Court of Quarter Sessions on the second and third questions; and they remitted the case to the Court of Quarter Sessions for rehearing and determination on this footing.

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The Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.) affirmed the decision of the Divisional Court that the appellants were in rateable occupation of the whole of the land, and held further that in determining the rateable value of the said land the price paid for the land might, and in the absence of better evidence ought to, be taken into consideration.

1912. Nov. 21, 22. *Balfour Browne, K.C.*, and *Macmorran, K.C.* (with them *Oulton*), for the appellants. The appellants are not in rateable occupation of the moorland, and as regards the remaining lands they are rateable only at their value as plantations and nurseries. Legal possession does not of itself constitute occupation. The owner of a vacant house is in possession, but so long as he leaves it vacant he is not rateable for it as an occupier—*Reg. v. St. Pancras Assessment Committee* (1)—and there is no distinction between a vacant house and vacant land: *Smith v. New Forest Union Assessment Committee*. (2) There is no ground for saying that where no other person is occupier the owner must necessarily be the occupier. It is true that in such cases ownership raises a presumption of occupation, but that presumption has been rebutted here by the finding of the Court of Quarter Sessions. To constitute occupation there must be possession plus use, and that use must be beneficial in the sense of providing some economic or pecuniary benefit. The only benefit which the appellants get out of the moorland is securing pure water for their reservoir, but that benefit is taken into account in the rating of the reservoir. There is a distinction between “benefit” and “beneficial occupation.” Suppose a man buys a piece of land and keeps it vacant in order to preserve the view from his house, he is not rateable in respect of the vacant land, but he is rated for the greater amenity of his house. So here, the appellants have bought these lands in order to keep them

(1) (1877) 2 Q. B. D. 581, at p. 588, per Lush J.

(2) (1889) 61 L. T. 870.

vacant for the purpose of preventing the pollution of the water coming to their reservoirs. That is beneficial non-occupation, which is mere possession, and for possession the appellants are not rateable. The mere right of excluding trespassers does not amount to occupation. The appellants are getting no profit out of the land; they are merely preserving their property by insuring the purity of the water. The quantity of the water is the same as they got before the purchase. They bought for the purpose of insurance, and if a man insures a vacant house that does not make him rateable. The benefit which the appellants have got by their purchase is the power to prevent the pollution of the water. But suppose that instead of purchasing they had taken a covenant from the existing landowners, they could have secured the same benefit and could not have been rated. Does the purchase make any difference? Has their ownership been turned into occupation by reason of a benefit which they might have secured in various ways without purchasing? Here there has been no such beneficial use of the land as is required to constitute rateable occupation. The Court of Appeal have gone wrong by confounding "benefit" and "beneficial occupation." Hamilton J., on the other hand, proceeded on the view that the appellants had control of the land, but that is not sufficient. In *Smith v. New Forest Union Assessment Committee* (1) the owner had control of the land, yet he was held not to be in rateable occupation of it. Occupation depends on the will of the owner of the property, and, whatever his motive may be, if he puts the property to no use, he is not rateable in respect of it: *Rex v. St. Luke's Hospital*. (2)

[VISCOUNT HALDANE L.C. Suppose I elect to keep good farming land for shooting purposes, am I not rateable on its farming value?]

It is submitted not. In *Harter v. Salford Overseers* (3) it was recognized that the owner of a vacant house in which there is no furniture is not rateable, but in that case the owner of a mill was held to be rateable because machinery was left in it and he derived benefit from that use of his

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(1) 61 L. T. 870.

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(2) 2 Burr. 1053, at p. 1064, per

(3) (1865) 6 B. & S. 591

H. L. (E.) premises. In *Borwick v. Southwark Corporation* (1) the owner
 1913 of a partially fitted up warehouse was held to be rateable on
 LIVERPOOL the ground that he was holding the house for purposes of profit,
 CORPORATION but the decision turned upon the distinction between a ware-
 v. houseman and an ordinary owner: see *Rex v. Melladew*. (2)
 CHORLEY Neither of those cases has any bearing on the present. In
 UNION *Winstanley v. North Manchester Overseers* (3), the burial
 ASSESSMENT ground case, the owner was actually making a profit out of the
 COMMITTEE. land. As regards the basis of assessment, the respondents seek
 to treat the average purchase price of the whole of the land,
 namely, 45*l.* per acre, as evidence of its rateable value; but it is
 at most very slight evidence: *Great Central Ry. Co. v. Banbury*
Union. (4) •

[Reference was also made to *Rex v. Mayor of London* (5) and
Hare v. Putney Overseers. (6)]

Danckwerts, K.C., *Ryde, K.C.*, and *Gordon Hewart, K.C.*, for
 the respondents, were not called upon.

The House took time for consideration.

1913. Feb. 3. VISCOUNT HALDANE L.C. My Lords, I have
 had the advantage of reading the judgment which has been
 prepared by my noble and learned friend Lord Atkinson. I fully
 concur in its conclusions and I do not propose to add anything.

EARL OF HALSBURY. My Lords, I concur.

LORD ATKINSON. My Lords, the judgment of the Court of
 Appeal in this case, dated December 21, 1911, from which this
 appeal has been taken, affirmed a judgment of the Divisional
 Court, dated January 25 of the same year.

The matter came before the Divisional Court by way of appeal
 on a case stated from a decision of the Court of Quarter Sessions
 of the county of Lancaster sitting at Preston. The main
 question for decision on that appeal was whether the appellants

(1) [1909] 1 K. B. 78.

(3) [1910] A. C. 7.

(2) [1907] 1 K. B. 192, at p. 202,
 per Collins M.R.

(4) [1909] A. C. 78.

(5) (1790) 4 T. B. 21.

(6) (1881) 7 Q. B. D. 223.

are liable to be rated for the relief of the poor under 43 Eliz. c. 2, s. 1, as the occupiers of a tract of open moorland, about 859 acres in extent, of which they are the owners in possession, the same forming part of the gathering ground for the supply of water to their waterworks at Rivington, in the township of Withnell, in that county. The Court of Quarter Sessions held that they were not so rateable on the ground that they were not in occupation of the moor. The Divisional Court and the Court of Appeal held, on the contrary, that they were in such beneficial occupation of it as rendered them liable to be rated in respect of it. Subsidiary questions were raised as to the rate at which they, if rateable for the tract, should be rated, and also as to the rate at which they should be rated for a plantation, 306 acres in extent, another portion of their gathering ground, of which they were admittedly the owners and beneficial occupiers, under the Rating Act of 1874 (37 & 38 Vict. c. 54, s. 3), and a further question as to the admissibility of the price paid for certain of their lands as evidence of their rateable value.

The appellants are the owners of the Rivington Waterworks, in and by which they carry on the commercial business of vendors of water. The commodity which they sell is collected for them in a vast gathering ground 10,000 acres in extent. Owing to the configuration of this tract the rain-water which falls upon it flows towards their reservoirs in natural channels.

The appellants availed themselves for several years of this source of supply, though the gathering ground did not belong to them; but in order to give more absolute control over their catchment area, and thereby enable them the more effectually to protect from pollution the water gathered in it, and thus render that water better, purer, and presumably more saleable, they purchased in the year 1898, at very considerable cost, the whole tract of 10,000 acres. Part of the tract they let to tenants who are rated in respect of the occupation of their holdings. The appellants are themselves rated in respect of their reservoirs and works. And just as they have devoted the planted area to two uses, first, to the use of collecting water for them, and second, to the use of producing timber for them, they have also devoted the moorland to two uses, first, the use of gathering of water, and

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H. L. (E.) second, the use of harbouring, rearing, and feeding game. The
 1913 moor is a grouse moor. They have by lease, bearing date
 LIVERPOOL March 16, 1906, leased the sporting rights over it and the
 CORPORATION plantations, together with some other lands, to a tenant at a rent
 v. of 300*l.* per annum. Later on I shall deal with some of the terms
 CHORLEY of this lease, and the nature of the rights it confers. The
 UNION appellants, however, insist that, notwithstanding the second use
 ASSESSMENT to which they have thus devoted the moorland, lucrative though
 COMMITTEE. it be, they are not liable to be rated as being in beneficial occu-
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The changes which the appellants made in their treatment of, and mode of dealing with, the moor and their other lands, after they had purchased them, are described in the fifth and sixth paragraphs of the case stated. These run as follows:—"5. The said land when bought by the appellants consisted partly of agricultural land with farmhouses and buildings on it and more largely of moorland. In order to reduce the population and the cattle on the said land and so diminish the risk of pollution of the water flowing therefrom the appellants demolished or caused to be left unoccupied certain farmhouses and buildings thereon and abolished certain rights of pasturage and turf cutting which had been previously enjoyed thereon and limited the user thereof to purposes of sporting and afforestation in manner hereinafter appearing. 6. They had planted 297½ acres of the said land with trees for the purpose of improving the shooting, and had utilised 8½ acres as a nursery for young trees, and they had enclosed the said planted area in a ring fence. The remainder of the said land, 859 acres, was moorland already enclosed by a fence when the appellants bought it. They had made a few grips in the said planted area for the purpose of adapting it for plantations. The water from said grips flowed naturally like the rest of the water on the said land to the waterworks of the appellants."

In order to prove that an owner in possession of such an extensive tract as this has entered into actual occupation of it, one is not obliged to prove the doing of some physical act on every portion of it. One must have regard to the kind of occupation of which the tract is reasonably susceptible. Acts done on one portion of it may furnish strong evidence of his having

entered into, and being in actual occupation of, other portions of it, or indeed of the whole tract. The fencing off and planting of nearly 300 acres of this tract, and the demolition of farmhouses and other buildings erected upon other portions of it, go strongly to prove in this case, that the appellants had entered into actual occupation of the whole tract. But as regards the moorland there is much more.

The gamekeeper of the lessee, acting with the authority of the appellants, regularly warned trespassers off the moor. Since the purchase the trespassers have been more rigorously excluded than theretofore. Before the passing of the Rating Act of 1874 the right of sporting over land granted by the owner of the lands was not rateable under the statute of Elizabeth, not being a "hereditament": *Reg. v. Battle Union*. (1) Now the right is rateable, though granted in gross and severed from the occupation of the land: *Kenrick v. Overseers of Guilsfield*. (2) It was stated that the lessee is rated under this statute in respect of the sporting right granted to him. He has no estate or interest in the moorland itself, but his lease contains covenants binding him to burn each year a portion of the old ling or heather growing on the moor, in the manner therein described, to the satisfaction of the appellants, and also binding him to keep and maintain the shooting butts and stands and walls (presumably on the moor) in good and substantial repair to the satisfaction of the agent of the corporation. The appellants have thus appointed a person to dispose yearly of some of the heathery produce of the moor, and to repair and maintain certain physical structures upon it. If the lessee keeps his covenant and does those things, he does them not by virtue of any estate or proprietary interest which he has in the land or right over it, but as the agent of the appellants. The physical acts thus required to be done by him should consequently, if done, be, for the purpose of this question of occupancy, treated as their acts.

Presumably the lessee has performed his covenant during the years his lease has run. If so, the appellants have, through him as their agent, been dealing physically with the produce of this land in such a way as to increase the value of the right

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(1) (1866) L. R. 2 Q. B. 8.

(2) (1879) 5 C. P. D. 41.

H. L. (E.) of sporting over it. This latter right is, in its true legal nature, a right springing from, and incident to, the occupation of the land. In *Reg. v. Battle Union* (1) Cockburn C.J. says: "Now the right to take game upon land is an incident to the occupation of the land. If the land is let without any reservation or any previous granting away of that right, the right follows as a necessary consequence of the right of occupation." So that, if the appellants themselves had, through their agents, (they could not do it otherwise) exercised the right of sporting over this moor before they granted the lease, they would undoubtedly be held to be in beneficial occupation of the moor. Well, to use the language of s. 6, sub-s. 2, of 37 & 38 Vict. c. 54, the appellants have severed the right of sporting from the occupation and let it. The lessee, however, does not thereby become the occupier of the moor, and I am quite unable to see on what principle the maintenance and keeping in repair of the structures upon the moor, and the dealing each year in the manner described with the heather growing upon it, do not, under the circumstances, amount to a user of the land by the appellants, and a proof of their occupancy of it, notwithstanding the lease of the sporting rights.

As an illustration of how slight a user of land by its proprietor in possession will be held sufficient to render him liable to be rated as the beneficial occupant of it, one may refer to the decision in the case of *Rex v. Mersey and Irwell Navigation Co.* (2), apparently approved of in this House in the case of *Assessment Committee of Doncaster Union v. Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) See judgment of Lord Davey in *Holywell Union v. Halkyn District Mines Drainage Co.* (4) at page 132 of the report and the footnote on the following page. In the first-mentioned case the undertakers, the respondents, were empowered by statute to deepen and straighten the bed of portions of the rivers Irwell and Mersey so as to make them navigable. The exclusive right (a most valuable one) of navigating the portions of these rivers where those works were effected was conferred upon them,

(1) L. R. 2 Q. B. 8, at p. 13.

(2) (1829) 9 B. & C. 95.

(3) July 2, 1894. Unreported.

(4) [1895] A. C. 117.

subject only to this, that the riparian owners of land abutting on the streams had also the right to navigate the rivers, but only with pleasure boats. The respondents had acquired for the purpose of this navigation certain towing paths and locks in respect of which they were admittedly rateable. The point at issue was whether they were also rateable as occupiers of the subaqueous soil, the bed of the river. They were held not to be so, because they were not the owners of the bed and soil, but only entitled to an easement over it. It is quite clear, however, from the judgments of Bayley J. and Parke J., that, had they been owners of the bed and soil, they would have been held to be rateable as the occupiers of it, though the only way in which they used the soil was to navigate the waters lying above it.

In *Jones v. Mersey Dock and Harbour Board* (1) Lord Blackburn, in delivering the opinion of the majority of the judges, said: "It is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate." Lord Cairns' judgment in *Greig v. The University of Edinburgh* (2) is to the same effect. And Lord Herschell, in commenting in *London County Council v. Erith Churchwardens* (3) on this passage from Lord Blackburn's judgment, said: "The learned judge, in my opinion, did not and could not have meant that it is essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is I think rateable whenever its occupation is of value." That principle has been pointed out and acted upon in many subsequent authorities, and yet in the argument of this case before your Lordships it has not been steadily kept in view. And, indeed, with all respect to the learned judges who commented upon the judgment of your Lordships' House in the case of *Winstanley v. North Manchester Overseers* (4), I am not quite sure that the

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(1) (1864) 11 H. L. C. 443, at p. 462. (2) (1868) L. R. 1 H. L. Sc. 348.
(3) [1893] A. C. 562, at p. 585.

(4) [1910] A. C. 7.

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distinction between the kind of occupation of land which, however well established, is not rateable, and the kind of occupation which is rateable, has not, by one of them at least, been rather lost sight of. For instance, the Lord Chief Justice is reported (1) to have expressed himself thus: "On behalf of the respondents Mr. Danckwerts has contended that the proposition laid down by Lord Atkinson in giving judgment in *Winstanley v. North Manchester Overseers* (2), that 'owners in possession are prima facie occupiers, unless it be shewn that the occupation is in some one else,' is to be understood in the literal and bald way in which it is there stated, and that it governs the present case, and that therefore the owner of land in possession of the land as owner, if he does not allow anybody else to occupy it, is in rateable occupation of it." But this House never affirmed or purported or intended to affirm any such proposition as that the owner of land (not houses) is to be held to be prima facie in the rateable occupation of it in such circumstances.

The passage cited from page 14 of the report in *Winstanley's Case* (2), based as it was upon the judgments of Buller J. and Lord Herschell, had reference solely to the first of the three questions set forth at page 12 of that report, into which it was stated the question for decision resolved itself. These questions were (1.) (the bald question), "Does the appellant occupy this cemetery for which he is rated?" (2.) "If he does, is his occupation a thing of value?" (3.) "What is the measure of that value?" It is quite obvious that, according to the authorities already cited, the appellant would not have been rateable if the second question were answered in the negative, though the first question were answered in the affirmative.

I have read all the judgments delivered in the present case, as well as the authorities cited in them, and I have failed to find anything to lead me to the conclusion that the guarded and limited proposition laid down by Lord Herschell, of which the proposition laid down by me in the *Winstanley Case* (2) was but a literal reproduction, is, when properly understood, unsound. There is, however, much beyond that prima facie presumption in the present case. The appellants relied much upon a passage

(1) [1911] 1 K. B. 1057, at p. 1066.

(2) [1910] A. C. 7.

in the judgment of Lord Mansfield in *Rex v. St. Luke's Hospital*. (1) There the Corporation of London had leased certain lands to several lessees for the purpose of having erected upon them an hospital for the reception of lunatics. The hospital was erected, and at the time it was rated it was occupied exclusively by the insane patients and the staff which attended upon them. It was sought to rate one of the members of this staff as the person in beneficial occupation of the entire hospital. Lord Mansfield, in delivering judgment, said that the material point in the case was, "Who can be named and charged as the occupier?" He then proceeded to shew that the lessees could not be so treated, as they were mere nominal trustees bound to use the premises as an hospital and for no other purpose, that one of the servants could not be so treated, and, of course, that the lunatics could not be so treated.

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The case was accordingly decided upon the ground that there was no occupier who could be rated. That was the only point decided. This clearly appears, not only from the language used by Lord Mansfield in the case itself, but also from the judgment subsequently delivered by him in the case of *Rex v. St. Bartholomew's-the-Less*. (2) During the argument of the *St. Luke's Hospital Case* (1), however, an anonymous case was cited to him, reported in 2 Salk. 527, in which Holt C.J. laid it down broadly "that hospital lands are chargeable to the poor as well as others; for no man," he said, "by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon their neighbours." This was the proposition with which Lord Mansfield was dealing when he made use of the language reported at page 1064 of the report upon which so much reliance was placed. This pronouncement of Lord Mansfield was entirely unnecessary for the decision of the case. It must be taken in connection with the statement of the law to which it referred. It does not touch the present case, and is, I think, in no way in conflict with the proposition already referred to as to *prima facie* occupancy laid down by Lord Herschell.

The next authority cited on behalf of the appellants was

(1) 2 Burr. 1053, at p. 1064.

(2) (1769) 4 Burr. 2435, at p. 2439.

H. L. (E.) *Smith v. New Forest Union Assessment Committee* (1), reported 1913 very imperfectly in the Court of Appeal in 61 L. T. 870 and 54 J. P. 324, and in the Divisional Court in 53 J. P. 661. The facts, as appears from these reports, were as follows. Smith, the person sought to be rated, had purchased a plot of building ground with the intention of building upon it. It was unenclosed when he bought it. He never himself enclosed it, cultivated it, built upon it, let it, or used it in any way. The cattle of a neighbour, without his knowledge or permission, frequently strayed over it and ate any grass they found upon it. He caused a bill to be affixed to a tree growing upon the plot stating it was to let, but he never succeeded in letting it. The posting of this notice was the only physical act he did upon it, and the question asked of the Divisional Court by the justices in the case stated was this: Was Smith, under these circumstances, an occupier of this plot of ground within the meaning of 43 Eliz. c. 2? That question was answered in the negative. It was obvious that he, if in occupation of the plot at all, was not in such beneficial occupation of it as would render him rateable, and it is somewhat difficult to discover whether or no this was the precise ground of decision. Lopes L.J. said: "To constitute occupation under the statute of Elizabeth, there must be use and enjoyment of the property capable of being beneficial. There is no evidence of any such here." Lord Esher said: "He" (Smith) "never was in such occupation as to be rateable under the statute of Elizabeth." I do not think the decision is in any way applicable to the present case, or in conflict with the law as laid down by Lord Herschell.

But the authorities mainly relied upon by the appellants are those conversant with the non-rateability of vacant houses. I find great difficulty in reconciling these, one with the other, from the statement of the law by Lush J. in *Reg. v. St. Pancras Assessment Committee* (2) down to the decisions in *Rex v. Melladew* (3) and *Borwick v. Southwark Corporation* (4), and I find still greater difficulty in discovering any intelligible principle

(1) (1889) 53 J. P. 661; on appeal, (2) 2 Q. B. D. 581.

61 L. T. 870; 54 J. P. 324.

(3) [1907] 1 K. B. 192.

(4) [1909] 1 K. B. 78.

upon which the decisions are founded, or any principle applicable equally to vacant houses and to property like that sought to be rated in the present case.

Lord Blackburn, in *Harter v. Salford Overseers* (1), says that the exemption of vacant houses from rateability is a good rough rule which may work well in practice, but that he could never understand the reason why a vacant house should not be rated if there is no furniture in it. During the argument Lord Halsbury suggested a possible construction of the statute of Elizabeth which would afford a quite intelligible reason for the practice which is followed. It was, as I understand it, this. The statute of Elizabeth enumerates "houses" as well as "lands" in the list of properties the occupiers of which are to be rated for the relief of the poor.

In one sense a house is merely land with the bricks, mortar, and the other building materials of which the house is composed resting upon it, and in that sense there would be no difference in the legal nature of the hereditament whether these materials were heaped together upon the ground in an unformed mass or were built and fashioned into a house. The word "land" would include the site and the superincumbent materials in both cases. This, however, is plainly not the sense in which the word "house" is used in the statute, since it is mentioned as a separate and different kind of property from land. When the statute, therefore, enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house *as a house*; that is, that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses may reasonably be devoted to; and that, as a vacant house is not used for any of these purposes, it is not occupied *as a house* within the meaning of the statute. However this may be, I do not think the cases dealing with the rateability of vacant houses are applicable to such a property as this moor, which, through the operations of nature, unaided by man, produces each year products such as grass, heath, and bracken, useful and valuable to man, and in this case rears and

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(1) 6 B. & S. 591, at pp. 595, 597.

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harbours game upon it in addition, thus differing in almost every aspect from a vacant house, which produces nothing, and is used for no purpose whatever. Mr. Balfour Browne has urged that occupation includes possession plus use. He admitted, however, that if the appellants had built an embankment across the mouth of a valley on this moorland and flooded the valley, thereby turning it into a reservoir to supply their lower works, they would properly have been held to be in beneficial occupation of the lands upon which the water rested in the valley. I am quite unable to discover any principle upon which these latter lands can be distinguished on this point from those upon which the rain-water falls and over which it runs on its way to its resting place. The lands of each kind all help to this same end, and serve in different ways to effect the same ultimate purpose, namely, to feed the appellants' works with a supply of pure and unpolluted water for their commercial gain. Accepting, then, for the moment, Mr. Balfour Browne's definition, I am clearly of opinion that each of the uses to which the appellants have devoted this moorland, the commercial use of collecting for them water which they in their business vend, and its use as a game preserve of the kind described, and certainly those two uses combined, are sufficient to turn their admitted possession of the moor into that beneficial occupation of it which renders them rateable in respect of it. For all the foregoing reasons I think the order of the Court of Appeal, dated December 21, 1911, was rightly made, and should be affirmed, and this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 3, 1913.

Solicitors for appellants: *F. Venn & Co., for E. R. Pickmere, Town Clerk, Liverpool.*

Solicitors for respondents: *Crowders, Vizard, Oldham & Co., for Stanton & Sons, Chorley.*

[HOUSE OF LORDS.]

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| (ET E CONTRA.) | |

Scottish Law—Trust—Liability of Trustees—Breach of Trust—Action by assumed Trustees to recover Loss to Trust Estate caused by Negligence of Original Trustee—Mora—Contributory Negligence—Right of Pursuers to represent Beneficiaries—Interest—Rate of Interest.

A testator, who died in 1858, by his trust disposition and settlement gave to his son, on his attaining the age of twenty-five, an option to purchase his dwelling-house. In 1870 the son, who acted as agent in the trust, being then about to attain the age of twenty-five, announced to the trustees his intention to exercise this option, and the trustees signed and delivered to him a disposition of the house in his favour, which was duly recorded. The trustees took no steps either in 1870 or for seventeen years afterwards to obtain payment of the purchase-money, and the money never was paid. In 1887, the testator's widow being then the sole surviving trustee, the pursuers were assumed as trustees, and they endeavoured to make the son account for the trust estate, but subsequently ceased their efforts owing to the refusal of the widow to allow her son to be sued. In 1902, on the death of the widow, the assumed trustees brought an action of accounting against the son, but the action proved abortive by reason of his bankruptcy and death. Between 1887 and 1902 the son was in a position to make good the purchase-money. In 1909 the assumed trustees brought an action against the beneficiaries of a deceased trustee to recover the purchase-money alleged to have been lost to the trust estate through his negligence as trustee. The defenders pleaded mora as a bar to the action:—

Held, that the plea of mora was not sustainable against the pursuers suing as trustees on behalf of the beneficiaries, and that the defenders were jointly and severally liable, to the extent to which they were respectively lucrati from the estate of the deceased trustee, for the price of the house with interest thereon at the rate of $3\frac{1}{2}$ per cent. per annum from the death of the widow.

Decision of the Second Division of the Court of Session in Scotland, 1912 S. C. 50, affirmed.

APPEAL and cross-appeal from an interlocutor of the Second Division of the Court of Session in Scotland recalling an

* *Present*: EARL OF HALSBURY, LORD KINNEAR, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

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interlocutor of the Lord Ordinary. (1) The action was raised by Mr. and Mrs. Schulze, as assumed trustees acting under the trust disposition and settlement of the late Hugh Lees, the trustees of the marriage contract of Mr. and Mrs. Schulze, and the trustees of the marriage contract of Mr. and Mrs. Brown, against the representatives of the late John Dun, one of the original trustees of the settlement, for the sum of 1040*l.*, with compound interest thereon from May 31, 1870, as the loss alleged to have been caused to the trust estate through the negligence and wrongful actings of the said John Dun as such trustee. Mrs. Schulze and Mrs. Brown, who were daughters of the truster and beneficiaries under his trust disposition and settlement, were also made pursuers as individuals but were dismissed from the action.

The defenders pleaded (*inter alia*) that the pursuers were barred by *mora*, taciturnity, and acquiescence from insisting in the action.

The truster, Hugh Lees, a writer of Galashiels, died on December 3, 1858, leaving him surviving his widow and four children, namely, Eleanor, who died an infant and unmarried, Richard, Elizabeth, afterwards Mrs. Brown, and Mary, afterwards Mrs. Schulze. By his trust disposition and settlement the truster provided to his widow the *lifereit* of his whole estate until his eldest child should attain twenty-five, at which period he directed his trustees to convert his whole estate into money for division equally among his children as they respectively attained the age of twenty-five, subject to such an annual allowance to his widow as his estate might appear to his trustees to be able to afford. The truster further conferred on his son Richard, on attaining the age of twenty-five, a right to purchase his dwelling-house in Abbotsford Road, Galashiels, at a price to be arrived at by making a certain deduction from the value of the house as fixed by valuation. In the event of Richard Lees exercising his option to purchase the house, he was put under an obligation by the settlement to provide a suitable house for his mother and sisters if they did not live with him.

The acting trustees under this settlement were the truster's

(1) 1912 S. C. 50.

widow, his brothers George and Robert Lees, William Sanderson, and John Dun. The trustees appointed as agent in the trust a Mr. Stewart, who had been a partner of the truster, and, when Richard Lees attained the age of twenty-one, Stewart assumed him as a partner. The firm of Lees and Stewart thereafter acted as agents in the trust, and Richard Lees was looked upon by all concerned, both trustees and beneficiaries, as the partner who looked after the trust. Richard Lees attained the age of twenty-five on May 20, 1870, and shortly before that date he intimated to his father's trustees his intention to exercise his option of buying the Abbotsford Road house. The trustees having obtained a valuation of the house, the price, after allowing the stipulated deduction, was fixed at 1040*l.*, and a disposition of the house was prepared in favour of Richard Lees. Richard Lees was at this time engaged to be married to a lady in England and he proposed to convey the house to the marriage contract trustees. The English solicitors of the lady requested Messrs. Fyfe, Miller & Fyfe, S.S.C., Edinburgh, to attend to her interests. On May 26, 1870, Mrs. Lees, the widow, signed the disposition as a trustee and as a consenting beneficiary, and on the same day Mary Lees, afterwards Mrs. Schulze, also signed it as a consenting beneficiary. On May 28 Richard Lees obtained the signatures thereto of George and Robert Lees. On the same day he wrote to John Dun enclosing the disposition and asking him to sign it and send it in an enclosed envelope to Fyfe, Miller & Fyfe. He added that he was in the course of preparing states, &c., to be laid before the trustees preparatory to the winding up of the trust, but that this deed required to be executed sooner. Dun signed the disposition on May 31. Sanderson did not sign it. The signatures of three only of the trustees to the deed were required for its valid execution. It did not appear from the evidence how the disposition got back into the hands of Richard Lees. The disposition was recorded on June 2, 1870, the warrant for registration being signed by Richard Lees. Thereafter the house was conveyed by him to his marriage contract trustees, who were infeft. The disposition bore that the price (which was therein erroneously stated to be 1060*l.* instead of 1040*l.*) had been instantly paid. In point of fact the price

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was never paid or accounted for by Richard Lees to his father's trustees. In 1887 the widow and John Dun were the sole surviving trustees. Accordingly Mr. Schulze was assumed into the trust by an informal deed dated August 16, 1887, and both Mr. and Mrs. Schulze were assumed by a formal deed on November 25. In the interval between the two deeds, namely, on October 22, 1887, John Dun died in his eighty-fifth year. No meeting of the trustees was held between April 26, 1870, when they gave instructions for the disposition of the house to be prepared, and December, 1887, nor were any steps taken by them to obtain payment of the purchase-money by Richard Lees or to get the trust funds into their own names. Shortly after his assumption as trustee Schulze knew that the whole of the trust funds remained uninvested in the hands of Richard Lees, and that he had exercised his option to purchase the house, had got a disposition of the house executed in his favour, and had made over the house to his marriage contract trustees, and he either knew or suspected that the price of the house had not been paid. In 1887 and 1888 Schulze was pressing Richard Lees to account for the trust estate, but in 1889 these efforts ceased in consequence of the unwillingness of the widow to allow proceedings to be taken against her son. On April 27, 1902, the widow died. Immediately after her death Mr. and Mrs. Schulze raised an action of accounting against Richard Lees, but the action was not proceeded with owing to his bankruptcy and death in November, 1902. In 1904 Mr. and Mrs. Schulze raised an action against Richard Lees' marriage contract trustees for payment of the price of the house, but in 1905 the First Division of the Court of Session, affirming the decision of the Lord Ordinary, Lord Pearson, assolizied the defenders from the conclusions of that action. Up to the year 1905 no claim had been made either against John Dun or against his representatives, and the claim which culminated in the present action was first initiated in a letter of December 5, 1905, written by Mr. Schulze to Mr. Dun's only son, John Sanderson Dun. The present action was raised in April, 1909. The estate of the late John Dun had been completely wound up in 1898 and the defenders were his beneficiaries or their representatives. The Lord Ordinary (Lord Mackenzie)

sustained the plea of mora and assolizied the defenders from the conclusions of the action. Upon the question of negligence his Lordship came to the conclusion that there was a failure on the part of Mr. Dun, in common with the other trustees, to supervise the affairs of the trust, and that if an action had been raised against the trustees and the representatives of those who were dead within a reasonable time after the assumption of the present pursuers to compel them to make good the price of the house they would have been liable; but that there was no special negligence on the part of Dun arising from the fact that he was the last to sign the disposition and that it was he who delivered it without seeing that the price was paid. On the question of mora he found: (1.) That Mr. and Mrs. Schulze knew at or shortly after the date of their assumption the facts necessary to enable them to sue the previous trustees, including Dun, for the price of the house. (2.) That the reason why Mr. Schulze abstained from taking proceedings against Richard Lees during the widow's lifetime was that the latter would not allow her son to be sued. (3.) That Richard Lees was in good credit from 1887 to 1902 and that if proceedings had been taken against him at any time during that period the purchase-money could have been recovered from him. He therefore came to the conclusion that there had been an unreasonable delay on the part of the pursuers in exercising a known right, and that this delay had prejudiced the position of the defenders by depriving them of the recourse which they could have had against Richard Lees; and, consequently, that the plea of mora was an answer to the action.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen) recalled the interlocutor of the Lord Ordinary and held that the defenders were jointly and severally liable to the extent to which they were respectively lucrati from the estate of the late John Dun for payment of the 1040*l.* with interest thereon at the rate of 3½ per centum per annum from the death of Mrs. Hugh Lees. Their Lordships agreed with the findings of fact of the Lord Ordinary, except that Lord Salvesen was of opinion that Mr. Schulze, although he had the means of knowledge, did not in fact know that he had any remedy against Dun's representatives until 1905;

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 — take proceedings in the lifetime of the widow constituted negli-
 gence for which they might be answerable to the beneficiaries,
 that was not sufficient to relieve the defenders of the consequences
 of their author's breach of trust as in a question with the bene-
 ficiaries, whom the pursuers represented.

Mr. and Mrs. Schulze and their marriage contract trustees
 appealed against this interlocutor in so far as it awarded simple
 interest at the rate of $3\frac{1}{2}$ per cent. per annum from the death of
 the widow and asked for compound interest at the rate of 5 per
 cent. per annum from May 31, 1870.

The defenders lodged a cross-appeal, to which all the pursuers
 were made respondents, against this interlocutor, so far as it
 overruled the plea of mora and held them liable to make good
 the loss to the trust estate, and also against a subsequent inter-
 locutor decerning the defenders to pay the costs of the action.

The marriage contract trustees of Mr. and Mrs. Brown, who,
 as well as the appellants, were made respondents to the cross-
 appeal, did not appear.

1913. Feb. 11, 17. *The Appellant Schulze* in person.

Scott Dickson, D.F., and *Constable, K.C.* (with them *Charles H. Brown*) (all of the Scottish Bar), for the respondents. The
 question raised by the cross-appeal is whether the plea of
 mora or laches, as it is called in England, ought to have been
 sustained. Lord Salvesen took the view that the plea of mora
 was not available as a defence to an action against a trustee
 for breach of trust, but there is no such rule of law. In *In re Sharpe* (1) this question was raised by Fry L.J. in the course of
 the argument, but there was no decision upon the point. That
 was a claim against directors, who are in the position of trustees,
 and the Court of Appeal, affirming North J., disallowed the plea
 of laches upon the facts; but North J. was of opinion that, if
 the persons there sought to be made liable had been prejudiced
 by the delay, the liquidator, and those on whose behalf he was
 suing, might have been precluded from recovering. In *Liqui-
 dators of City of Glasgow Bank v. Mackinnon* (2), which was also

(1) [1892] 1 Ch. 154.

(2) (1882) 9 R. 535.

a claim against a director, the claim was rejected on the ground (amongst other grounds) of lapse of time. There the person against whom the claim was made was in a fiduciary relation just as Dun was here. To sustain the plea of mora two things are requisite. First, there must have been excessive or unreasonable delay in asserting a known right; and, secondly, the position of the party against whom relief is sought must have been prejudiced: *Assets Co., Ltd. v. Bain's Trustees* (1), per Lord President Kinross; *Lindsay Petroleum Co. v. Hurd* (2), per Sir Barnes Peacock, approved by Lord Blackburn in *Erlanger v. New Sombrero Co.* (3) In this case there has been a delay of twenty-two years on the part of the assumed trustees after knowledge of all the material facts, and the defenders' position has been prejudiced by that delay, because, if an action had been brought against them in 1887, or at any time afterwards down to 1902, they could have had recourse against Richard Lees, who during that period was in a position to make good the purchase-money. For fifteen years the assumed trustees deliberately abstained from suing Richard Lees, not in the interest of the beneficiaries, but in deference to the wishes of their co-trustee, and it is that abstention which has caused the loss to the trust estate; yet they now seek to recover that loss, for which they are themselves primarily responsible, against the representatives of a trustee who died in 1887. If a trustee so neglects his duty that he abstains from putting forward a claim until it becomes stale, and in the meantime the debtor's position is prejudiced, there is no reason in the law of Scotland why the plea of mora should not be held good against him to the same extent as against any one else. If this were an English action the Trustee Act, 1888, s. 8, sub-s. 1 (b), would afford a complete answer to the claim, and, though that Act does not apply to Scotland, it is submitted that the law of Scotland is to the same effect. [They also referred to *Metropolitan Bank v. Heiron*. (4)]

[EARL OF HALSBURY intimated that their Lordships did not desire to hear the respondents' counsel upon the original appeal

(1) (1904) 6 F. 692, at p. 705.

(3) (1878) 3 App. Cas. 1218, at

(2) (1874) L. R. 5 P. C. 221, at p. 1279.

p. 239.

(4) (1880) 5 Ex. D. 319.

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H. L. (SC.) 1913 and that they did not desire to hear the appellant Schulze upon the cross-appeal.]

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EARL OF HALSBURY. My Lords, I am disposed to think that this matter may be very summarily disposed of. I am of opinion that the judgments of Lord Salvesen and Lord Dundas should be adhered to, and I am content with the reasons given by Lord Salvesen.

With regard to the question which has been suggested as to the amount of interest due, I am of opinion that it is absolutely unarguable, and I move your Lordships that both appeals be dismissed with costs.

LORD KINNEAR. My Lords, I agree entirely with the opinion expressed by the noble and learned Earl, and I have only to add that I at the same time agree with Lord Dundas that it is unnecessary to express an opinion upon many of the topics which were argued at the Bar. It is not material to consider whether the defenders' pleas of mora and taciturnity or their counter-charge of negligence against the pursuers would have been valid if the latter had been suing in their own private right and interest, because, as the learned judges very clearly point out, they are suing as trustees to recover trust moneys, and are entitled to call the defenders to account, even if they may be themselves accountable.

LORD SHAW OF DUNFERMLINE. My Lords, I also agree except to this extent, that I think it is unnecessary to make any pronouncement with regard to the larger portion of the observations in Lord Salvesen's judgment. For in my opinion the matter is brought to its proper and only issue in one of the concluding sentences of that learned judge's speech, when he says that he cannot see that Mr. and Mrs. Schulze's delay affords any defence against a claim which he thus in my mind properly characterizes: "a claim by beneficiaries whose rights are being maintained and can only be maintained by the trustees now in office." It appears to me that the beneficiaries' action so directed under the guidance and charge of the existing trustees is not open, upon

the facts disclosed, to the defence of mora, and that that is the only point which we have to decide.

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LORD MERSEY. My Lords, I agree entirely, and for the reasons pronounced by my noble and learned friend Lord Shaw.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal and cross-appeal dismissed with costs.

Lords' Journals, February 17, 1913.

Agents for appellants: *Helder, Roberts, Walton & Giles, for Andrew Tosh, S.S.C., Edinburgh.*

Agents for respondents: *John Kennedy, W.S., for Ronald & Ritchie, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

SUMMERLEE IRON COMPANY, LIMITED . APPELLANTS; H. L. (Sc.)*

AND

FREELAND RESPONDENT. 1913
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Employer and Workman—Compensation—Arbitration—Competency—Question arising as to Duration of Compensation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3.

The employers of a workman, who had been totally incapacitated by an accident, admitted liability under the Workmen's Compensation Act, 1906, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause: "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application is made for payment." The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, such as he could embody in a memorandum of agreement

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for the purpose of recording, and he refused to sign the receipt and initiated arbitration proceedings:—

Held, that a question had arisen between the parties as to the duration of compensation, and that the arbitration was competent.

Payne v. N. Fortescue & Sons, Ltd. [1912] 3 K. B. 346, and *Gourlay Brothers & Co. (Dundee), Ltd. v. Sweeney* (1906) 8 F. 965, considered.

Interlocutor of the Second Division of the Court of Session in Scotland, 1912 S. C. 1145, affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland under the Workmen's Compensation Act, 1906, upon a case stated by the sheriff-substitute for Lanarkshire. (1)

The material facts found by the sheriff-substitute were as follows: On December 13, 1911, the respondent sustained injuries to his right eye through an accident arising out of and in the course of his employment with the appellants as a miner, and since that date he had been totally incapacitated. The appellants were liable to pay the respondent 14s. 9d. per week in respect of such total incapacity. On December 29, 1911, the appellants, as stated by the sheriff-substitute, "admitted liability, and tendered payment of the compensation then due." They requested the respondent to sign a receipt therefor, but the respondent objected to the terms of the receipt and refused to sign it. The receipt contained the following clause:—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made." The respondent objected to the form of the receipt on the ground that he was entitled to have from the appellants a simple and unqualified admission of liability such as he could embody in a memorandum of agreement for the purpose of recording. He therefore invoked arbitration on the ground that a question had arisen as to the duration of the compensation. The sheriff-substitute was of opinion that no question had arisen between the parties which fell to be settled by arbitration and accordingly he dismissed the application. The questions of law for the opinion of the Court were: (1.) Did the foregoing facts disclose any question between

(1) 1912 S. C. 1145.

the parties on which arbitration could be competently invoked? H. L. (Sc.)
 (2.) Was the sheriff-substitute right in dismissing the application? 1913

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie) answered the first question in the affirmative and the second in the negative, and they recalled the deliverance of the sheriff-substitute and remitted the case to him to proceed.

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Robert Munro, K.C. (of the Scottish Bar), and *Harold W. Beveridge*, for the appellants. No question within the meaning of s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906, has arisen which can be submitted to arbitration. In order to give the arbitrator jurisdiction, first, there must be a definite question between the parties either as to the liability to pay compensation or as to the amount or duration of compensation, and, secondly, that question must have arisen. At the date of the application for arbitration there was no existing dispute as to duration within the meaning of the Act. The appellants were paying, or had offered to pay, all that the respondent asked and non constat that they would not have been willing to continue the payment. The arbitrator, if he had entertained the application, would have been pronouncing a decision as to the future. Liability and amount are to be settled at once; but duration is a question that arises in the future. No question of duration arises until the employer stops or diminishes payment before the cesser of total incapacity. *Payne v. N. Fortescue & Sons, Ltd.* (1), if rightly decided, is conclusive in the appellants' favour.

[*VISCOUNT HALDANE L.C.* I do not feel quite sure of the principle upon which the Master of the Rolls proceeded in that case. Prima facie there was there a question whether the workman had sustained an injury of permanent duration. Is not the workman entitled to have the question of duration decided as much as any other question under the Act?]

The view of the Master of the Rolls was that the question had not matured and that the workman's remedy was ready to hand the moment the employer stopped or diminished compensation.

Gourlay Brothers & Co. (Dundee), Ltd. v. Sweeney (2) and

(1) [1912] 3 K. B. 346.

(2) 8 F. 965.

H. L. (SC.) *Field v. Longden & Sons* (1), which were decided under the corresponding provision of the Act of 1897, are to the same effect.

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 FREELAND. *Alexander Moncrieff, K.C., and J. C. Fenton* (both of the Scottish Bar), for the respondent, were not called upon.

VISCOUNT HALDANE L.C. My Lords, the question in this appeal arises under s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906, which provides for recourse to arbitration in a case of dispute in the following terms: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." It is to be observed that duration is specified as one of the matters about which a question may arise, and that is not the less true because the First Schedule, by paragraph 16, provides that from time to time there may be applications to review the amount of compensation. There may be a decision that the injury is *prima facie* of indefinite duration, that is to say, permanent; and what the schedule does is to provide machinery for the review of that matter from time to time as the question arises.

My Lords, in this case the respondent, who was a workman in the employ of the appellant company, sustained injury to his right eye in the course of his employment as a miner in their colliery, and he has been totally incapacitated since the date at which the injury was received. There is no doubt as to the amount which the appellants are liable to pay; it is agreed that it is 14s. 9d. a week in respect of total incapacity in accordance with the Act. But a question has been raised, which is the subject of these proceedings, as to whether there is a dispute under the Act as to the duration of the compensation. The appellants,

(1) [1902] 1 K. B. 47.

admitting liability to the extent which I have indicated, tendered payment of compensation, but on terms only; they said to the respondent: "You must sign the receipt in these terms; at the first or any subsequent payment liability is admitted only for the compensation at the date of the payment; further liability, if any, will be determined week by week when an application for payment is made." The respondent objected to that on the ground that he was entitled to an admission of liability, embodied in an agreement so that he could have it recorded, or that he was entitled to arbitration, on the ground that a question had arisen as to duration. The sheriff-substitute, while thinking there was no question, nevertheless properly stated a case for the opinion of the Court, and the Second Division, taking a different view from his, laid down as law that in this case, as the contention of the appellants would have put the workman in the position of being in petitorio, that is to say, without any *prima facie* right to continuance of payment in any subsequent proceedings, he would, if it was allowed to prevail, be deprived of the right to which he was entitled, to have a question of the *prima facie* duration of his injury immediately determined, subject to the remedy which the appellants would have if they could discharge the burden which lay upon them on an application under paragraph 16 of the schedule.

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My Lords, in that state of things the question comes before this House whether the decision of the Second Division was right, and reliance has been placed—I think not without apparent justification—by the learned counsel for the appellants on the case of *Payne v. N. Fortescue & Sons, Ltd.* (1), a decision of the Court of Appeal in England upon a question which presented some analogy to the case before your Lordships.

My Lords, I do not think it necessary to go in detail into the question whether *Payne v. N. Fortescue & Sons, Ltd.* (1) was rightly decided. It is sufficient to say that there are observations in the judgment with which I do not find myself in agreement, and I cannot, in this appeal from the Court of Session, treat myself as bound by that decision. I therefore turn to the Act of Parliament itself as the only matter which concerns us here, and upon

(1) [1912] 3 K. B. 346.

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the construction of the section on which the argument turns, I am of opinion that there is a question as to duration, which arose in these proceedings, and which ought to have been decided, and upon which the respondent was entitled in presenti to have arbitration. I agree with the reasons for this conclusion given by Lord Salvesen in his judgment, and I cannot treat this case as disposed of by the principle laid down in general terms by Lord Pearson in the case of *Sweeney*. (1) The facts in the present case raise what, in my opinion, is a definite question.

My Lords, under these circumstances I agree with the decision of the learned judges in the Second Division, and move your Lordships that the appeal be dismissed.

EARL OF HALSBURY. I am of the same opinion.

LORD KINNEAR. I am entirely of the same opinion.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. The Scotch case of *Gourlay Brothers & Co. (Dundee), Ltd. v. Sweeney* (1) was cited to your Lordships. I desire to add, if I may do so, a reference to that case. As I gather the circumstances which were narrated in the judgment of Lord Pearson, they were substantially these: that the employer of the workman had throughout, after the accident sustained by his employee, acknowledged liability, that he had paid compensation upon the amplest scale under which he would have been liable in law, that he continued that payment, and that he proposed to make no change in the relations so constituted.

My Lords, in those circumstances it was held that so long as a party has secured by private arrangement the full rights which he had either by statute or at common law, and no suggestion of a challenge of these rights by the persons so admittedly liable is made, it was not appropriate to institute proceedings under the statute, for giving him the very thing which he was then obtaining, and had throughout obtained. It is unnecessary to determine whether or not that case was properly decided; for I cannot hold that this House can consider the decision of Lord Pearson,

to which I have referred, as assisting towards a conclusion in this case, the circumstances in which are so materially different and of a character so much more strongly in the direction of destroying the rights of, and the protection afforded to, the workman.

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My Lords, I desire particularly to add with regard to the case of *Payne v. N. Fortescue & Sons, Ltd.* (1) that, like my noble and learned friend on the woolsack, I do not find myself in agreement with certain observations there made by the learned judges. The circumstances of that case also do not equate with those of the present case. In the present case no payment has been made, and issue was at once taken for the determination of the rights of parties. The dates are significant. On December 29 this workman, totally incapacitated by reason of an injury to his eye, was offered by his employers a certain weekly payment on condition of granting this receipt. He declined, and on the following January 5, no payment by the employer by that time having been made (and no payment has yet been made), he brought his application under the Workmen's Compensation Act. The whole question between the parties was stated timeously. The workman is in the position of having been injured; the employer is in the position of having declined to pay; and, my Lords, with much respect to some observations which have been made in certain decided cases, the difference and dispute between the parties are not, as it humbly appears to me, confined in such a situation to the mere question of the duration of compensation.

There are three points, no doubt, as was properly stated, upon which arbitration can proceed. There is the point of liability itself; there is the point as to the amount; and there is the point as to duration. What are the conditions appended to the receipt tendered to this workman as conditions under which he was to be bound before he received any payment? They are thus expressed, namely, "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made." These conditions appear to me, my Lords,

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to amount fundamentally to a possible challenge upon each and all of those three points. As I view them, after one week had elapsed it was open to the employer, under the form of that receipt, substantially to challenge all liability whatsoever under the statute, also to challenge the amount, and also to challenge the duration. And, therefore, here is a condition tendered as attached to this receipt which is a negation of all the very points which the workman is entitled to have secured, and secured in such a way that an agreement can be recorded.

My Lords, I do not proceed to the further question. The policy of the statute is that there must be something which both parties can look to ; business could not be conducted unless both parties, employer as well as employed, were in the position of having something definitely fixed to which reference could be made in subsequent weeks, quarters, or years. It is quite true, as has been said by Lord Salvesen, that a workman accepting payment under such a receipt, if he sought to continue the situation which was thus established, but which the employers might wish to depart from or to change, would be put in petitorio. I do not find myself in any difference with the judgment of the Second Division, and I desire to say, for my own part, that there are passages in the judgment of Lord Salvesen, notably the second and third paragraphs of his judgment, which I entirely accept and respectfully adopt.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, February 10, 1913.

Agents for appellants: *Beveridge, Greig & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

HICKMAN & CO. APPELLANTS; H. L. (E.)*

AND

ROBERTS AND OTHERS RESPONDENTS.

1911

May 9.

Building Contract—Arbitration Clause—Reference to Building Owner's Architect—Disqualification—Collusion—Payments to be made on Certificate of Architect—Improper Delay in issuing Certificate—Action for Balance due under Contract before Issue of Certificate.

A building contract provided that the decision of the architect of the building owners on all matters in relation to the work should be final and that payments should be made on the certificate of the architect. The architect, under a misapprehension of his position, allowed his judgment to be influenced by the building owners and improperly delayed issuing his certificates in accordance with their instructions. After the completion of the work and the expiration of the period of maintenance the contractor sued the building owners for the final balance alleged to be due under the contract, but the final certificate was not issued until after the commencement of the action:—

Held, that the building owners were precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the certificate was conclusive as to the amount of the claim.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Hamilton J.

By a contract in writing dated December 31, 1906, C. P. Roberts, a builder, contracted with the appellants for the execution of certain building works in Shoreditch for the sum of 2750*l*.

The contract provided (clause 14) that the work should be done "to the entire satisfaction of the architects to the employers and freeholders," and it empowered the architect (clauses 12 and 15) to order the omission of any work, to direct any extra work to be done, and to make any variation of any portion of work described in the specification; and the contract further provided as follows:—

* *Present*: LORD LOREBURN L.C., LORD ASHBOURNE, LORD ALVERSTONE, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (E.) Clause 17. "The decision of the architect relating to any
1911 matters or thing or the goodness or sufficiency of any work, or
HICKMAN the extent or value of any extra or omitted work, shall be final
& CO. conclusive and binding on all parties."
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By clause 22 the period of maintenance was fixed at three months after certified completion.

Clause 29. "Payment will be made to the contractor as the work proceeds on certificate of the architect at the rate of 80 per cent. of the work actually done in sums of not less than four hundred pounds, a further 10 per cent. to be paid on the practical completion of the work, and the balance on completion of the contractor's term of maintenance."

The appellants' architect was R. W. Hobden.

The work was duly completed on April 2, 1908, and sums amounting to 2300*l.* in all were paid by the appellants to Roberts, but the appellants refused to pay him any further sum. After the expiration of the period of maintenance Roberts commenced an action against the appellants by specially indorsed writ to recover 554*l.* 2*s.* 5*d.*, alleged to be the final balance of his account in respect of the work done by him under the contract and for extras, and applied for judgment under Order xiv. In opposition to the summons for judgment the architect, on August 21, 1908, swore an affidavit to which was exhibited a final certificate by him of the same date shewing that 339*l.* 9*s.* 4*d.* was due to Roberts, and thereupon the Master ordered the appellants to pay that sum to Roberts forthwith, which they did, and gave them leave to defend as to the remainder. The appellants by their defence pleaded that by the terms of the contract payment was only to be made upon the certificate of the architect, and that his decision upon the value of the work done was to be final; and that by his final certificate the architect had assessed the value of the work done at 339*l.* 9*s.* 4*d.* In his reply Roberts set up a case of collusion between the appellants and their architect.

During the pendency of the action Roberts died, and by an order of October 5, 1909, the respondents as his executors were substituted as plaintiffs.

On March 27, 1908, when the work was practically completed,

Roberts wrote to Hobden asking for a further certificate for 750*l*. Hobden forwarded Roberts' letter to the appellants, and on March 31 Mr. Bromet, a partner of the appellants' firm, replied that Hobden should on no account issue a certificate until he had received Roberts' account for extras. After some further letters from Roberts pressing for a certificate, Hobden wrote to the appellants on April 14, informing them that unless he heard from them to the contrary he intended to give Roberts a certificate for 600*l*. on the following Wednesday, and the letter concluded: "As Mr. Roberts is entitled under the contract to a certificate I must of course give it to him." Bromet replied on April 15 to the same effect as before, and added that it was no use issuing a certificate as Mr. Hickman would not sign a cheque for it. On April 16 Hobden wrote to Roberts, "I regret I cannot enclose certificate, my clients' instructions being that the certificate I next give you is to be a final one including for a complete settlement of the work done, into which I shall be prepared to go after Easter," and on April 24 he wrote again, "Had you not better call and see my clients, because in the face of their instructions to me I cannot issue a certificate whatever my own private opinion in the matter." After some further correspondence Roberts placed the matter in the hands of his solicitors, Messrs. Whitelock & Storr, who on May 23 sent to Hobden a detailed account from Roberts shewing over 1000*l*. due. On May 29 Bromet wrote to Hobden requesting him to forward this account and concluding, "I need not say you must reduce the account as much as possible on account of the heavy expenses we have already had in the matter." The correspondence also included a series of earlier letters of a similar character shewing the relation between Hobden and the appellants. Some of these earlier letters will be found set out in the judgment of Lord Alverstone. On June 6. Whitelock & Storr wrote to Hobden stating that their client was entitled to a certificate for at least 500*l*. without going into the detailed account as to the extras, and threatening legal proceedings unless the certificate was granted. This letter was forwarded by Hobden to the appellants with a request for instructions. Ultimately a meeting was arranged for June 17 at Hobden's office. At that

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H. L. (E.) meeting Hobden, after waiting for Bromet, who arrived late, to
 1911 give his consent, handed to Roberts a certificate for 400*l.*, and
 HICKMAN undertook that the outstanding items should be gone into and
 & Co. settled forthwith.

v.
 ROBERTS. On July 1, 1908, Roberts, after repeated efforts to obtain pay-
 ment from the appellants, commenced an action against them
 for the 400*l.*, and ultimately recovered judgment against them for
 that amount. On July 15 Roberts issued the writ in the
 present action to recover the outstanding balance. This action
 was tried by Hamilton J. without a jury. It appeared from the
 evidence of Hobden that he did not issue the final certificate of
 August 21, 1908, until instructed to do so by the appellants'
 solicitors.

The learned judge found upon the evidence that Hobden
 had delayed issuing certificates to Roberts owing to the instruc-
 tions of the appellants and held that in this respect he had
 failed to conform to his duty under the contract, but he
 exonerated him from the suggestion of corrupt conduct. He
 further held that, although Hobden's breach of duty gave to
 Roberts the right to refuse to be bound any longer by his
 decisions, yet Roberts, by asking for further certificates after
 full knowledge of Hobden's conduct, had elected to treat
 Hobden as the person by whose decision he was bound, and
 had therefore forfeited this right; and he dismissed the action.

The Court of Appeal (Vaughan Williams, Fletcher Moulton,
 and Farwell L.JJ.) reversed this decision. They came to the
 conclusion upon the evidence that collusion between the architect
 and the defendants (the appellants) was established and that
 there had been no full disclosure to the plaintiff of the true
 relation between the defendants and the architect. They there-
 fore held that the plaintiff was not bound by his election and
 was entitled to relief, and they directed that the question of the
 amount should be settled by an official referee.

1911. May 9. *Hugo Young, K.C.*, and *Alan Macpherson*,
 for the appellants.

Vachell, K.C., and *Boydell Houghton*, for the respondents, were
 not called upon.

LORD LOREBURN L.C. My Lords, in this case I do not think that any of your Lordships are in doubt that we ought to affirm the judgment of the Court of Appeal. I will not enter upon the story at all, but will put my reasons for concurring with the Court of Appeal. I think the defendants cannot rely upon this certificate, either as a condition precedent or as an adjudication binding on the other party. The architect, Mr. Hobden, did, I think, place himself in a position which deprived his certificate of the value which otherwise it would have had. Fletcher Moulton L.J., after referring to what he had done, says: "He is no longer fit to be a judge, because he had been acting in the interests of one of the parties, and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to." I agree with that, but it is not in my opinion a case to which the terms "turpitude" or "fraud" are apt. I think the real error of Mr. Hobden was that he mistook his position; that he meant to act as a mediator; that he had not the firmness to recognize that his true position was that of an arbitrator, and repel unworthy communications made to him by the defendants. It is undoubted that the defendants, Messrs. Hickman, tried in this respect to lead him astray in their own interests.

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It is argued by Mr. Young that, knowing the attitude taken up by Mr. Hobden, the plaintiffs really waived his irregularity with a full disclosure of the facts. I will not enter upon it, but I do not think there was a full disclosure of the facts. I think that if these letters had been shewn to Messrs. Roberts they would then have instantly taken up a stronger line than they did.

I also think that the unexplained delay on the part of Mr. Hobden after June 17 in doing what was his duty as regards his certificate was due to the mistaken view he had taken of his being required to procure the assent of the defendants before he discharged his duties under the contract.

My Lords, as to Messrs. Hickman, I will only say that they seem to have been trifling with a just claim for a long time, and that they would be properly punished by having to pay

H. L. (E.) the costs of this action, as well as whatever may hereafter be
1911 adjudged to be due from them.

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LORD ASHBOURNE. My Lords, I quite concur. I am of opinion that the arbitrator, Mr. Hobden, did not preserve that attitude of judicial independence which was needed and required of him in the discharge of his responsible and possibly difficult duties; but I do not think it necessary to go so far as to adopt the words which may be noticed in the reading of the case to have been used, the words "turpitude" and "fraud." I think that he had not present to his mind, and did not act upon, that need for judicial independence that is requisite for any one in his position, and I entirely agree with the conclusion upon that subject expressed in the judgment of the Court of Appeal.

LORD ALVERSTONE. My Lords, this case has such general importance that I will detain your Lordships a few moments in concurring, as I do, with the motion which my noble and learned friend the Lord Chancellor has made. My Lords, it has been pointed out in several cases in the Court of Appeal, and particularly by Lord Bowen in *Jackson v. Barry Ry. Co.* (1), that the position of these arbitrators is a very important one, and that the system could not have been allowed to exist, had it not been that it has been found that persons in the position of engineers or architects are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties. My Lords, it has to be remembered that in the great majority of cases they are the agents of the employers. It has also to be remembered that they not infrequently have to adjudicate upon matters for which they themselves are partly responsible. Both these matters have been pointed out by Lord Bowen. It is therefore very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position.

My Lords, the only ground upon which Hamilton J. decided against these plaintiffs was that with full knowledge as to what

(1) [1893] 1 Ch. 238.

had happened prior to the giving of the final certificate, or I ought to say prior to June 17, they continued to allow the architect to adjudicate upon matters between them. I desire to say that had I thought that the view taken by my brother Hamilton of the facts was correct I should have concurred in that view ; but it seems to me, for reasons that I will very briefly explain to your Lordships, that, as the facts strike me, that view cannot be taken. It has been a little overlooked in the argument of Mr. Hugo Young at the Bar that there are two questions here. The first question is whether the action could have been brought without there being a certificate. A decision in his favour upon that point would only affect the question of the costs of the action, but the real fight and battle here is not only as to whether or not the action could be brought without a certificate, but whether the certificate of August 21 is a binding certificate, because under the procedure, and the very reasonable procedure, adopted in this case, assuming it was a binding certificate, that money in the course of the action was paid over to the plaintiffs, and they have no further claim in the matter. Therefore, we have not merely to consider whether or not an action could be brought without any certificate, but whether this certificate when given is binding so as to preclude the plaintiffs from recovering any further amounts before the official referee.

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My Lords, I desire most respectfully to adopt the language of the Lord Chancellor, and to say that it seems to me that it is quite clear upon the correspondence that this architect had forgotten his duty to act strictly judicially through the whole course of the proceedings, and that it cannot be said that the plaintiffs had such knowledge of his conduct or of what passed between him and Messrs. Hickman as to prevent them now raising that point. My Lords, I do not propose to go through the correspondence, but there are four letters to which attention should be called as illustrating the point that I make.

In Mr. Hobden's own letter of November 8, 1907, to the defendants, when he first writes with regard to a claim made for the delay and the extra works, he says : " Of course, both of these claims will want very careful investigation with the view to considerably reducing the amounts." I quite agree, if I may say so,

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with the argument of the learned counsel at the Bar that that of itself would not amount to very much, although it does not seem altogether a strictly judicial expression, because Mr. Hobden's duty was not to consider reducing the amounts but to say what was fair between the parties. But, my Lords, what is much more important is the letter that was written to him by the defendants on November 12, 1907, in reply. I desire to point out to your Lordships with regard to this letter, as well as with regard to two others to which I shall have to call attention, that an architect or engineer acting as arbitrator and recognizing his judicial position ought at once to have repudiated any such letter when written to him. Messrs. Hickman, as my noble and learned friend the Lord Chancellor said a few moments ago, certainly were not themselves maintaining the judicial position of Mr. Hobden, for they write then to him: "Of course it is as well to explain to Mr. Roberts that if he wants to do any more work for us he must be reasonable, and not take advantage of our unfortunate position." That, to my mind, was referring to a matter which ought to have had no influence whatever—the prospect of further work—when Mr. Hobden was performing his judicial duties. Mr. Bromet (a member of the defendants' firm) on March 31, 1908, writes again: "I should say on no account should you issue this until we have got Roberts' account for the extras, as we believe you said this would have to be gone into, as you thought he was making charges he had no right to make. You must also bear in mind that there is a lot of work in the contract which has not been done, and which has been substituted for other work." That, to my mind, is an indication that Messrs. Hickman were not leaving Mr. Hobden alone, but were pointing out to him matters in their favour with regard to the claim that was being made.

Then if I may for one moment refer to the letters which were referred to in the Court of Appeal, it seems to me that they shew conclusively that throughout the whole of this time Mr. Hobden was not properly recognizing or appreciating what his position was. Mr. Hobden had sent on to Messrs. Hickman Messrs. Roberts' letter pressing for a certificate, and then they reply at once on April 15, 1908, "He (Mr. Hickman) further said, as one

who understands building, this should have been sent in at once, as it was no use asking him to see the job when the account had not been delivered, as he said he had a similar experience in Red Lion Street, and he does not want it to occur again, therefore any account Roberts has should be dealt with at once. You will please understand it is no use issuing a certificate as I am sure Mr. Hickman will not sign a cheque, so that it is best to get the account at once and have it properly checked, and so get the whole matter cleared up."

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My Lords, we know what happened. It is only necessary to consider what happened in two sentences to see that these letters may have had, and probably did have, some effect upon Mr. Hobden's position. We know that with regard to the issue of an interim certificate he did, without justification and against his own opinion, abstain from issuing it from the month of April down to June 17, and we further know that he did not issue his final certificate till he was directed by the solicitors of Messrs. Hickman to do so. My Lords, I now ask myself this question: Had Mr. Roberts known of this correspondence, of these communications between their arbitrator architect or architect arbitrator and the employers, would he have consented to have gone on? The Court of Appeal obviously thought he would not, and it seems to me, my Lords, under those circumstances that it is quite impossible to say that the judicial finding of a certain amount due to Mr. Roberts, made when he was in ignorance of that which had passed between Messrs. Hickman and Mr. Hobden, the architect, ought to be binding upon him.

One notices, and it is important to notice it, that, as was elicited by Mr. Vachell, Mr. Hobden was an intimate friend of Messrs. Hickman, and a gentleman who had done as much as 100,000*l.* worth of work for them. These are the very conditions as pointed out in the judgment to which I have referred, as shewing the confidence that is entertained by builders and by contractors in referring their disputes, and allowing them to be referred, to the architect or engineer, who is the agent of the employers. But, my Lords, the consequence of that practice is that persons who act in that judicial position must maintain that judicial position throughout, and I think it would be contrary to

H. L. (E.) justice if it were held (which is the important matter in this case) that this adjudication which Mr. Hobden has made against, 1911
 HICKMAN or at all events upon, the interests of Messrs. Roberts was binding upon them.
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My Lords, I humbly concur in the motion that the Lord Chancellor has made that this appeal be dismissed.

LORD ATKINSON. My Lords, I concur, and I base my judgment upon three conclusions at which I have arrived. First, I think it is clearly established upon the evidence that this arbitrator had ceased to be a free agent, that he had forfeited his independence as an arbitrator, and had allowed himself to be under the control or under the influence of the building owners. I think it is not satisfactorily found that he ever recovered his independence, but that on the contrary the fair presumption from the entirely unexplained delay in giving his final certificate is that he continued to be under the influence of the building owners. So far as the point is concerned as to adopting him with all the defects and weaknesses he has shewn, in order that that should be effective, there ought, in my view, to have been a full and ample disclosure of every communication which had passed between him and the building owners. That did not take place, and, therefore, in my opinion, the argument which has been addressed to the House cannot be sustained. At the same time, my Lords, I quite concur with what has fallen from my noble and learned friend upon the woolsack that the conduct of the architect in this case has probably been too severely censured. He was led astray. He was induced to forfeit his independence, and was influenced by an anxiety to promote the interests of the building owners, but I think it is quite possible that that may have happened without any intention on his part to do what was wrong, or possibly without even the knowledge that he was doing what was wrong. Therefore, as regards the use of the words "collusion," "corruption," or "fraud," these are rather extravagant terms to apply to the conduct that has been established against him. I do not refer to the correspondence to which my noble and learned friend who has preceded me has already referred. For these reasons I think the appeal should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, the position of an architect in a building contract is one of great delicacy. He is placed in that position to act judicially, when, to the knowledge of both parties, the person who is his master and his paymaster is one of the parties to the contract. It has been affirmed by Courts of law, however, that that being the case his judicial position must be accepted, and it follows from that that in the peculiarly delicate situation in which such a man stands the Courts of law must be particular to see that his judicial attitude is maintained.

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With regard to Mr. Hobden, I desire to say that I do not think anything has occurred in this case to suggest for one moment that when the ultimate accounting between the owners and the contractor took place Mr. Hobden's certificate would have overstated by a single penny or understated by a single penny the amount that in his judgment was due between these parties. It is right and just to Mr. Hobden that I should say so; but upon the other hand, my Lords, I look to his judicial position, which, as I say, was one of great delicacy—delicacy which ought to be carefully regarded by judgments of Courts of law—and I find that it is established, conclusively as I think, that he did not act with sufficient firmness to enable him to decide questions according to his own opinion, those questions affecting the issue of certificates and the interim amounts thereof. Instead of doing so, my Lords, he accepted the instructions or orders of the owners and their solicitors upon that topic.

My Lords, I need go no further than Mr. Hobden's own letter of April 24, 1908, in which he says in these broad terms, speaking not to both the parties, but to one party to the contract: "Had you not better call and see my clients, because"—he then adds—"in the face of their instructions to me I cannot issue a certificate, whatever my own private opinion in the matter." My Lords, that seems to me to be an open and frank avowal that the judicial actor on this stage was playing his part under instructions and orders from one party in the cause. My Lords, that happened on April 24. I do not see any evidence in this case that Mr. Hobden's position was ever changed from one of external control to judicial independence, but, on the contrary, I

H. L. (E.) find that so late as the month of August he swears in his evidence
 1911 that he never issued his final certificate till the solicitors instructed
 him to do so.

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My Lords, in these circumstances I ask myself what was the situation of the parties when July 15 was reached and this action was brought? The state of matters then can be summed up in three propositions: first, that the entire contract work was done; secondly, that the three months' period of maintenance after the doing of the contract work had expired; and thirdly, that a certificate was wrongly withheld on account of the submission of the arbitrator's judgment to the judgment of the proprietors, and of the latter preventing the issue of that document. In those circumstances, my Lords, the reasons given were improper, and it was on account of that control exercised over him by the appellants and their solicitors that the certificate was delayed. The grant of a certificate cannot, my Lords, in my judgment, be a condition precedent to a right to recover if the architect's conduct and judgment are controlled as stated. That being so, I think the action was properly raised, and, having been raised, my Lords, the *litis contestatio* was entered into between these two parties, and it was too late for the architect whose conduct had brought about the raising of this action to issue such a certificate as one party can found upon now. In my judgment the Court of Appeal has adopted a correct course in sending this to an independent referee.

*Order of the Court of Appeal affirmed and appeal
 dismissed with costs.*

Lords' Journals, May 9, 1911.

Solicitors for appellants: *Greenwell, Higham & Co.*

Solicitors for respondents: *Whitelock & Storr.*

[HOUSE OF LORDS.]

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| BRISTOL CORPORATION | APPELLANTS; | H. L. (E.)* |
| AND | | 1913 |
| JOHN AIRD & CO. | RESPONDENTS. | March 13. |

Building Contract—Arbitration Clause—Reference to Building Owner's Engineer—Disqualification—Dispute involving Examination of Engineer—Staying Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.

Where a contractor executes works under a contract containing a provision for the reference of disputes to the engineer of the other party to the contract, and upon the settlement of the final account there arises a bona fide dispute of a substantial character between the contractor and the engineer involving a probable conflict of evidence between them, the fact that the engineer, without any fault of his own, must necessarily be placed in the position of judge and witness is a sufficient reason why the matter should not be referred in accordance with the contract; and the Court will therefore refuse to stay an action by the contractor for payment of the account.

Decision of the Court of Appeal affirmed.

Whether, where the action embraces several items, all within the reference clause, as to some of which the arbitrator is disqualified from acting, the Court should allow the action to proceed as to these items and allow the remaining items to be referred, *quære*.

Per Lord Parker of Waddington: It is the practice of the Chancery Division to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference, and in many cases that is a desirable course.

APPEAL from an order of the Court of Appeal affirming an order of Scrutton J. in chambers.

The appellants were the owners of the Bristol Dock undertaking, which included the Avonmouth Docks.

The management of the undertaking was in the hands of the city council acting by a docks committee, and the docks engineer to the appellants was William Wilkinson Squire.

By a contract under seal dated March 17, 1902, made between the respondents and the appellants, the respondents agreed to execute and deliver up to the docks committee of the appellants certain dock works at Avonmouth, as described in the conditions,

* *Present*: LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

H. L. (E.) specification, schedule of quantities and prices, and drawings, at prices amounting altogether to 1,394,512*l*.

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By clause 1 of the conditions "the engineer" was defined as meaning Mr. Squire.

Clause 80 provided: "If and whenever any doubt, dispute or difference shall arise or happen whether during the progress or after the completion of the works touching or concerning the works, or any of them, or their cost, or relating to the quantities, qualities, prices, description or manner of work done or executed, or to be done and executed by the contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, omissions, alterations or deviations made to, in, or from the works, or any part of them, or touching or concerning the meaning or intention of this specification, or of the schedule of quantities and prices, or any part thereof, or of any drawings, instructions or directions referred to in the said specification, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order, or award which may have been made by the engineer, or in anywise whatsoever relating to the interest of the corporation or of the contractor in the premises, then, and in every such case, such doubt, dispute or difference shall, from time to time, be referred to and be settled and decided by the engineer, who shall be competent to enter upon the subject matter of such doubt, dispute or difference with or without formal reference or notice to the contractor or the corporation, and who shall judge, decide, order and determine thereon, and that whether the contract be then existing or completed, or determined, and who shall have full power and authority to correct and amend any errors or inaccuracies in this specification, or in the schedule of quantities and prices, or in any certificate, order or award made in pursuance hereof; and to the engineer shall also be referred the final determination of any sum or sums, or balance of money to be paid to or received from the contractor by the corporation in respect of the works or any part thereof, or of any matter arising under or in connection with the contract. Any matter not included above as being subject to the final

decision of the engineer, and which may become a subject of dispute between the contractor and the corporation, shall, if so agreed between the parties, be referred for decision to the consulting engineers, or failing agreement, to an arbitrator to be appointed by the Board of Trade."

The works were begun on April 3, 1902, and were completed towards the end of 1908, subject to the period of maintenance. From time to time during the execution of the works periodical certificates were given by the engineer for payments, which were duly made by the appellants, amounting to 1,705,913*l.*, and on March 2, 1909, the respondents rendered to the appellants their final account shewing a balance claimed by the respondents to be due to them (inclusive of retention money) of a further sum of 248,463*l.* 13*s.* 9*d.* Negotiations ensued between the respondents and the engineer with reference to the settlement of this account, and certain further payments were made on account, but in February, 1910, the respondents, after an unsuccessful application had been made by them to the Board of Trade under the provisions of the contract for the appointment of an independent arbitrator, broke off the negotiations, and the final certificate was compiled in their absence. By this certificate the engineer certified the final balance due to the respondents to be 11,848*l.* 10*s.* 11*d.*, which with the payments already made amounted to a total payment of 1,752,761*l.* 10*s.* 11*d.* This final balance was paid to the respondents on June 21, 1910.

On June 29, 1910, the respondents commenced an action against the appellants, claiming 171,215*l.* 18*s.* 5*d.* for work and labour done and materials provided for the appellants. The appellants entered an appearance to the writ and immediately afterwards took out a summons, asking that the action might be stayed and that the matters in difference between the parties might be referred to the arbitrator named in the contract. In support of this application affidavits were sworn by (amongst others) Mr. Savile, the appellants' assistant engineer, and Mr. Pearce, their resident engineer in connection with the works in question. No affidavit was sworn by Mr. Squire. On behalf of the respondents the principal deponents were Mr. Malcolm Aird, a member of the respondents' firm, Mr. Lucas, their engineer, and Mr. M'Clure,

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an agent in their employment. Of the matters in dispute two items related respectively to the rubble filling in certain embankments and to pumping in spaces between monoliths, and the amounts involved in these disputes were 25,000*l.* and 16,000*l.* respectively. As regards the first item the contract provided for approved stone rubble filling at 5*s.* 3*d.* per cube yard. In June, 1902, a verbal agreement was made between the engineer and the late Sir John Aird that, for the purpose of making payments to the respondents for the rubble filling, factors should be obtained for the conversion of weight into volume, and that the volume of the rubble filling should be calculated from its weight, and payments made to the respondents on that footing. The various kinds of stone then used for rubble filling were Pennant stone, limestone, and stone from the respondents' Tytherington quarries. In July, 1902, after certain experimental weighments and measurements had been made, the figures of 17 cwt. per cube yard for Pennant stone, 19 cwt. per cube yard for limestone, and 18 cwt. per cube yard for the Tytherington stone were mutually agreed as being the factors to be used for the conversion of weight into measurement. In 1903 the respondents were authorized by the engineer to use, in addition to the large rubble stone previously sanctioned, good dry sharp quarry rubbish. This quarry rubbish came from the same quarries as the previously approved stone. In all the interim certificates from July 31, 1902, and also in the final measurement, the above-mentioned factors were used to determine the dimensions of the stone in the rubble filling. Ultimately, however, in 1909, the engineer refused to allow these factors upon the ground that the measurements of July, 1902, were unreliable as applied to quarry rubbish, and he made further weighments and measurements of the rubble filling to ascertain the proper rate of payment. The questions in dispute between the parties as regards this item were as to the material in fact used and whether the factors of conversion agreed in July, 1902, applied.

As regards the second item the respondents' case was that the plans annexed to the specification contemplated monoliths being sunk close together, which would involve a risk of their colliding, and were defective in this respect; that in June, 1902,

the engineer decided to increase the space between the monoliths to five feet, and that this alteration involved expensive pumping operations for the excavation of the spaces between the monoliths; that on January 25, 1905, the engineer verbally agreed to allow the respondents for pumping a price of 3s. per cube yard as a provisional price and afterwards to fix a price in relation to cost; that the respondents did the work on the faith of this undertaking; and that afterwards the engineer refused to consider the price in relation to the cost of the work or to give any advance on the figure of 3s. per cube yard.

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The appellants denied that the contract plans shewed that the monoliths were to be sunk close together, and alleged that the engineer fixed the width of the spaces at five feet in consequence of the respondents' wish to use a grab for the purpose of the excavation, and that this spacing was adopted solely for the respondents' convenience and at their instance; and they further alleged that the price of 3s. per cube yard was allowed by the engineer not as a provisional price but as a concession to the respondents.

The respondents also brought charges of personal misconduct against the engineer, but in the Court of Appeal these charges were withdrawn.

Scrutton J. in chambers, affirming an order of the Master, refused to order a stay of proceedings, and the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.) affirmed the order of the learned judge.

1913. March 12, 13. *Sir Robert Finlay, K.C.*, and *Gore-Browne, K.C.* (with them *T. W. H. Inskip*), for the appellants. An arbitration clause referring disputes to the engineer, who is the servant of one of the contracting parties, results in an enormous economy because he is intimately acquainted with the subject-matter of the controversy, whereas if the inquiry were held before an independent arbitrator all the facts would have to be proved *de novo*. The respondents obtained the contract upon the terms of submitting all matters in difference to the engineer, and could not have obtained it except on these terms, and, in the absence of misconduct on the part of the engineer, they ought

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not to be permitted to repudiate this obligation. It must have been in the contemplation of the parties when they entered into the contract that in the course of the execution of the works disputes such as those in question in this action would arise between the engineer and the contractors. The doctrine that because the examination of the engineer in regard to the matters in dispute may be desirable the arbitration is to be withdrawn ought to be applied with great caution, because otherwise these arbitration clauses will be frittered away. From the nature of the case the dispute is always, in substance, between the contractor and the engineer, who is in a certain sense the judge in his own cause. It follows that the arbitrator must necessarily be a somewhat biassed person and must have some preconceived views on the matter in controversy; but if he is prepared to listen to argument and to determine the matter as fairly as he can, that is all that the contractor is entitled to demand. It is no part of the duty of the Court to make a new contract for the parties: *Jackson v. Barry Ry. Co.* (1); *Ives & Barker v. Willans* (2); *Eckersley v. Mersey Docks and Harbour Board*. (3) In *Robert W. Blackwell & Co., Ltd. v. Derby Corporation* (4) there was a substantial dispute as to the conduct of the arbitrator. In *Hickman & Co. v. Roberts* (5) the arbitrator was acting in collusion with the building owners. In *G. Freeman & Sons v. Chester Rural Council* (6) the Court did not profess to depart from the principles laid down by Lord Bowen, and the decision of Buckley L.J. is in substance though not in terms a decision in the appellants' favour. Further, assuming that the action should be allowed to proceed in regard to the items in question, those items form a comparatively small portion of the aggregate of the matters in dispute, and there is no ground for withdrawing the arbitration as to the rest: *Ives & Barker v. Willans*. (7)

[*Sir Alfred Cripps, K.C.*, interposing on behalf of the respondents, objected that this point had not been raised in the Court

(1) [1893] 1 Ch. 238, at pp. 247, 3rd edition of Hudson on Building Contracts, p. 23; 75 J. P. 129.
 per Bowen L.J.

(2) [1894] 2 Ch. 478.

(5) Ante, p. 229.

(3) [1894] 2 Q. B. 667, at p. 673,
 per Lord Davey.

(6) [1911] 1 K. B. 783.

(4) (1909) First Supplement to the

(7) [1894] 2 Ch. 478, at p. 489,
 per Lindley L.J.

of Appeal and intimated that the respondents intended to argue that the objections which applied to the two items specifically dealt with by the Court of Appeal applied equally to many of the other items of the claim.]

Sir Alfred Cripps, K.C., Upjohn, K.C., Lynden Macassey, K.C., and C. H. G. Campbell, for the respondents, were not called upon.

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LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal of February 26, 1912, which itself affirmed an order made by Scrutton J. sitting at chambers which again affirmed an order of Master Macdonell. The effect of the last-mentioned order was that the Master refused to stay the action instituted by the respondents. That action was instituted to recover a sum of 171,000*l.* odd for work and labour done. The work and labour was done under an agreement entered into between the respondents and the appellants to construct the docks at Avonmouth. It is a very heavy contract, the contract price as stated amounting to a million and a half, and the cost of the actual operations to one and three-quarter millions. The work has been completed and it is alleged that the balance sued for remains due. The contract contained a stipulation that all matters in dispute should be referred to the arbitration of Mr. Squire, the engineer of the appellants, and an application was made to stay the proceedings and to compel the respondents to go to arbitration under that clause.

My Lords, I do not think there is any dispute between the parties as to the law applicable to such a state of things. If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that,

H. L. (E.) notwithstanding those pre-formed views of the engineer, that
 1913 gentleman shall listen to argument and determine the matter
 BRISTOL submitted to him as fairly as he can as an honest man; and if
 CORPOR- it be shewn in fact that there is any reasonable prospect that he
 TION will be so biassed as to be likely not to decide fairly upon those
 v. matters, then the contractor is allowed to escape from his bargain
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 & Co. tribunals of the land. But I think he has more than that right.
 Lord Atkinson. If, without any fault of his own, the engineer has put himself in
 such a position that it is not fitting or decorous or proper that
 he should act as arbitrator in any one or more of those disputes,
 the contractor has the right to appeal to a Court of law and they
 are entitled to say, in answer to an application to the Court to
 exercise the discretion which the 4th section of the Arbitration
 Act vests in them, "We are not satisfied that there is not some
 reason for not submitting this question to the arbitrator." In
 the present case the question is, Has that taken place?

My Lords, I have listened with great attention to the able
 arguments which have been addressed to the House, and I am
 utterly unable to get rid of the notion that upon two of the most
 important matters, namely, this filling and the excavation between
 the monoliths, Mr. Squire will necessarily be at once in the
 position of a judge and a witness. I think he must necessarily
 be in that position. I cannot imagine any position more
 unpleasant, any position more undesirable. If he be really a
 witness, then he must, in effect, be examined before himself, and
 cross-examined before himself, and he must decide upon his own
 veracity or reliability. I think there could be no stronger reason
 to induce the Court not to exercise their discretion to stay the
 action than that any gentleman who has taken upon himself the
 duties of arbitrator should be put in such an entirely anomalous
 position.

My Lords, as to the first of these two matters, the contract
 provides that the filling is to be with certain rubble filling,
 measured by cubic measurement. It is not contested that an
 agreement was entered into between the parties that some scale
 should be adopted whereby they could change cubic measure-
 ment into weight; that is not controverted. The question which is

controverted is, to what stuff that agreement applied. Undoubtedly four kinds of stuff have been used in this filling. The contention of the respondents, as I understand it, is that that measure is to be applied to all these different kinds of stuff; the contention of the appellants, on the other hand, is that that measure is only to apply to three kinds of filling, and not to the fourth. That is the point of controversy between the parties, and it is a point upon which I think Mr. Squire must be in such a position that he would really be giving evidence, he would really be a witness on that important point.

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The next question is with regard to the excavation between the monoliths. I am sure I do not know which side is right, and I do not mean to express any opinion upon that question. As this case must go before some tribunal for decision, it is most desirable that nothing should be said upon the merits of the case which can possibly be avoided. But with regard to that matter, just as with regard to the first, it seems to me upon the evidence before the House that it is impossible to say that Mr. Squire would not be a most important witness to determine whether in fact what was promised was a gratuity, or whether his principals took upon themselves a legal obligation, the measure and amount of which, no doubt, was to be a matter for further consideration, and undertook to pay what might be thereafter determined. For these reasons I think it is not right that this gentleman should arbitrate upon these matters, and that full and sufficient reason has been given to the different tribunals before which this application has come to say "We will not exercise the discretion entrusted to us, and we will retain this action in the Courts of law."

My Lords, it has been suggested several times that these matters of dispute are spread over an enormous area and embrace a great many different items; and I am as fully conscious as anybody can be of the great objection to referring such matters as these to the ordinary tribunal of a judge and jury or a judge sitting alone to decide; it would be expensive, and it cannot be supposed that a judge or a judge and jury could bring to the decision of such questions the trained experience and knowledge of a gentleman in the position of Mr. Squire. That, no doubt, is so, and it has been pressed upon us that it would be such a great evil to

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take away from the decision of the arbitrator all these subjects, that we should refuse to stay the action as to the two matters to which I have referred, but allow the rest to be referred to arbitration. My Lords, no authority whatever has been cited to the House to justify any course such as that. The case, that has been referred to, which came before Lindley L.J., as he then was, of *Ives & Barker v. Willans* (1), was a case of an entirely different character. In that case the plaintiffs chose to join in the same action claims which could be referred to arbitration and claims which could not be referred to arbitration, and Lord Lindley's observations, which have been so much relied upon, entirely dealt with that state of things. He said that where the claims which could not be referred were trifling in amount, it would be a sad thing if arbitration were altogether prevented; and, on the other hand, if the claims which could be referred to arbitration were vast in amount and the material portions of the claim, it would be very irrational that they should not go to arbitration by reason of this adjunct which could not be referred. But, my Lords, that is not this case. Here the claims which are objected to are claims which could be referred; and what the appellants have pressed upon your Lordships is that you should take out of a number of claims, all of which could be referred, a certain number of them because the arbitrator is not in a position properly to decide these and allow him to examine into and adjudicate upon the others. That is a new departure so far as I have been able to ascertain in this system of law.

There is another objection to it, however, and that is that this point was not raised below, so that we have not the advantage of the decision of the Court of Appeal upon it. It is quite possible that if it had been raised below, it would have been found that there are several other items of the claim in which exactly the same question arises, and Sir Alfred Cripps informed us that according to his contention that was really so. There is this, also, to be borne in mind, that the two claims which are matters of controversy in this argument are themselves very wide and extended, and cover over 41,000*l.* between them, which is a very substantial part indeed of the entire claim. I do not think

(1) [1894] 2 Ch. 478.

it is at all possible, therefore, to yield to the application which has been so much pressed upon us.

My Lords, there is another matter on which Mr. Gore-Browne dwelt at some length; he says that it must have been contemplated by the parties that questions of this character would arise, and that therefore they must have been assumed to have contracted that they would go to arbitration, notwithstanding the fact that in that arbitration the arbitrator would be put in the position of judge and witness. My Lords, I cannot read anything in the contract to that effect. The parties must be held to have contemplated that they would have to go before a man with pre-formed views, but not to have contemplated that he would put himself in the position of a witness and adjudicate under such circumstances. This is, I think, to push matters to an extreme that is unwarranted.

My Lords, all the charges which have been made by the respondents against this gentleman have been withdrawn, and it would appear to me, speaking for myself, that he has unfitted himself, not because he is dishonest, not because he is prejudiced, not because there is any reason to think he would not decide the question fairly, but because he has placed himself in an anomalous and embarrassing position in which it is not fit that the duty should be upon him of arbitrating in these matters.

My Lords, for these reasons I think that the order appealed from is right, and that it should be affirmed and this appeal dismissed; and I move accordingly.

LORD SHAW OF DUNFERMLINE. My Lords, in the case of *Hickman & Co. v. Roberts* (1) I expressed my opinion with reference to the delicacy of the position of an arbitrator under a contract of this character, and I do not repeat the observations which I then made.

Where parties have agreed that the undertakers' engineer, whose judgment on details, such as additions, alterations, measurements, &c., may of course have to be indicated in the course or at the conclusion of a contract, is, nevertheless, to be arbitrator, then by that contract the parties stand bound.

(1) Ante, p. 229.

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For the arbitrator is thus accepted by them as one who will be so guided by the dictates of justice and professional honour as to put aside the bias which is natural in favour of all his own preconceived opinions and to act judicially.

My Lords, I do not hesitate to say, and with the less hesitation do I say it, that I follow in the track of those very eminent judges Lord Bowen and Lord Davey, that I view the whole of such a position as one invoking and possibly involving on occasions considerable trouble. *Prima facie*, a judge ought to be entirely apart from the subject-matter upon which he adjudicates; *prima facie*, in a contract of the kind I have sketched, he is the very opposite of what he ought to be. But, my Lords, the law is now settled in the sense I have mentioned, and I turn with satisfaction to the action of the Legislature which, I think, affords an opening for relief. By s. 4 of the Arbitration Act, 1889, where proceedings on a contract containing an arbitration clause are taken, the Court, if satisfied that there is no sufficient reason why the matter should not be referred, may make an order staying the proceedings. Upon that it is open to the Court always to affirm that upon the whole there does appear to be sufficient reason why the matter should not be referred.

That was the situation of affairs when these proceedings were brought before Master Macdonell, and in my humble opinion he exercised his judgment soundly and wisely in declaring that this was a case where sufficient reason appeared why the matter should not be referred.

My Lords, this contract, which was a large one for the construction of works at the Avonmouth Docks, was made on March 17, 1902; it contained within it the ordinary arbitration clause. The works began on April 3, 1902. It was then discovered that the bottom in which the filling was to be lodged for the construction of the breakwater and the like was very soft. In those circumstances in the month of June of the first year, namely, 1902, an arrangement was come to between the engineer on the one hand and the contractors on the other that there should be a measurement not by cubing in the soft soil and *in situ*, but by an ascertainment of weight at the quarry or upon delivery, and factors for conversion of weight into cubing were fixed. The

contract was thus changed to that extent, and by that change the parties continued to be bound during the entire progress of the contract.

My Lords, it is not unimportant to observe what was the specified nature of the stone that was to be supplied for the job. The specification is contained in the contract. The material to be supplied at so much per cubic yard was "approved stone filling." Who, my Lords, I asked in the course of the argument, was the person to judge and approve of that stone filling? It was the engineer, Mr. Squire, who is the arbitrator under the contract. We have the admission made, most properly, from the Bar that the stone filling was in point of fact to every yard of its cubing approved by the engineer. Now, six years after some of that filling has been made, the argument of the appellants is that this stone filling was stone filling, not per contract, but to some extent was stone filling in the sense of being composed of stones inferior in size to what was expected. My Lords, the parties are at arm's length upon that problem. Throughout these six years of supply all the measurements were furnished on the footing that the material supplied was the "approved stone" that was contracted for. And the engineer's certificates were periodically given, and his final measurement was made, upon that footing. The matter does not depend merely upon a verbal contract, for a letter is printed in the proceedings and a reference is there made to the agreement between the late Sir John Aird, the contractor, and Mr. Squire.

Thereafter, my Lords,—more than seven years after that—what the engineer proposes to do is to demand a sample taken from the embankments or breakwaters of the material which is there in situ, to analyse that sample and to ascertain how much of it he would denominate to be quarry rubbish or quarry refuse, and from that analysis to form a stupendous conjecture with regard to the contents of the whole of this part of the work, namely that, although it was all cubed, weighed, and specified as approved stone filling, nevertheless, a considerable proportion on that conjecture would be removed from that category. This would lessen the value by, it is reckoned, somewhere about 25,000*l*.

My Lords, the engineer's position is that a new contract other

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than that which has been printed binds the parties, namely, that there was to be a special exclusion of small rubble. The answer is, Where is that contract? And the reply which the engineer makes is that it is nowhere in writing: it was really made by word of mouth. There are cross averments upon that subject, and these cross averments, my Lords, are fundamental. This is not a case, and it is by the whole diameter of the distinction divided from a case, in which what is being done is to interpret or construe or apply a contract; this is a question whether in point of fact the new contract to which I have referred did or did not come into existence. The engineer says it did. The contractors say: Nothing of the sort: nothing of that kind did happen and we are not *ex post facto* to be bound by such a suggestion. Who, my Lords, can settle that in fact? It can only be settled by the one side and the other being put into the box. But who is the one side? The one side is the engineer himself who must give testimony going to this, that a new contract in point of fact came into existence to the effect that I have cited. My Lords, it does not appear to me that a much clearer case could arise for relief being operated under s. 4 of the Act of 1889. For this is more than a mere embarrassment of procedure: it is a contradiction of terms to say that the judge can appear as his own witness, be examined and cross-examined, and pronounce judgment upon his own memory, credibility, or evidence. Such a thing is a traverse of all ideas of judicial decorum.

My Lords, the second part of the case on which a similar contradiction arises has reference to the pumping spaces. It was feared that under the original plans danger and loss might arise by jolting or collision of the monoliths as they were being sunk into position. Accordingly—so the contractors contend—a new plan had to be made, under which a distance of five feet between each monolith was to be kept, leaving room for the operations of a grab for excavating purposes. We were informed by counsel at the Bar that that distance has been respected throughout.

The engineer, however, maintains there was no change of plan: the contractors say that there was a change specially ordered

and arranged by the engineer. There is one affidavit which upon this topic appears to me to be of vital importance : it is that of Mr. Malcolm Aird, who says that the engineer promised, when the work had proceeded and more definite information had been obtained as to the cost of pumping over the whole of the work, that he would reconsider the matter and fix a price in relation to the cost, and that on this undertaking the respondents proceeded with the remainder of the pumping work. That is plainly one side of the case. What is the answer which is made, not by the engineer, certainly, but by those representing his attitude and view upon this question? It appears from an affidavit sworn by Mr. Pearce, in which occurs this sentence : "The engineer did not at the interview of April 24, 1905, at which I was present, refer to or rely on any agreement between himself and the consulting engineers, and I have never heard of any such agreement." My Lords, as in the former case so now, it is not a question of construing the agreement, it is a question of whether in point of fact an agreement upon that subject was or was not in existence. The engineer and the contractors are at arm's length upon that fundamental issue, and it can only be cleared up by the testimony of the engineer being crossed by the testimony of the contractors. That again appears to me to supply those elements, to put it very moderately, of great embarrassment amounting almost to a denial of justice, if justice is to be secured by proceedings attended by the ordinary means.

But while, my Lords, I thus concur in the judgment to be pronounced, I desire for myself to say that I am not prepared, without further argument, to bind myself to the proposition that in a contract of large dimensions an objection to the arbitration of the engineer upon one item is to be considered as affording ground for the entire disqualification of the engineer as arbitrator under the contract. Cases may be figured in which items are completely separable from the rest of the bargain, and in which the arbitrator might proceed to judgment upon the main body of the case, leaving only for determination by some one else the small remaining item. I do not bind myself either one way or another upon that subject, except to say that when the proper time comes

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H. L. (E.) and it is argued, no doubt an opinion will have to be expressed
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My Lords, I concur.

LORD MOULTON. My Lords, I have come to the same conclusion. It has been a long settled principle of the common law of this country that no man can effectively withdraw himself from the protection of the Courts of law any more than he can effectively deprive himself of his personal freedom. But on the other hand for many years it has been recognized that there are cases in which a well selected domestic tribunal, in which the judge is one with a special acquaintance either with the facts of the case or with the subjects to which the litigation relates, may give more complete and speedier justice than the more elaborate procedure of the Courts of law (based as it is on the principle of complete independence of the tribunal from the parties, and the case itself,) is ever in a condition to render. Submissions to arbitration have therefore been more and more respected by the Legislature, and by the Courts in administering the legislation relating to them, during the last sixty years. The great step which gave to them their present status was taken in the Common Law Procedure Act, 1854. Up to that time a man could repudiate a submission to arbitration, even if the arbitration was pending, and he could refuse to go to arbitration, no matter how plainly he had contracted so to do, the only remedy for his breach of contract being an action for damages, which of course was an action that was utterly ineffective, since no damages could be proved in such a case. But after the Common Law Procedure Act, 1854, matters were in a very different position. The Legislature enabled these submissions to arbitration to be made the subject of indirect decrees of specific performance. A man was not deprived of his right to come to the Court and bring his disputes there, but the Court was invested with a discretion to refuse to him its assistance, if he had contractually bound himself to go to a domestic tribunal and nothing had happened which would make it unjust for the Court to insist on his keeping the bargain. In this way the right to come to the Court was preserved, while at the same time men could be forced to keep

contracts which they had made as to the tribunal which should settle disputes, which contracts were in the eyes of the business world an important part of the total contract entered into between the parties. No one who has had any experience of the contracts under which great engineering works, for instance, have been carried out in the last half-century can doubt that no well advised corporation would have accepted the offer of a contractor to carry out the works which it desired to execute without having an arbitration clause in the contract, and I think I may almost go so far as to say without insisting that the engineer whom it employed for the purpose of superintending the work should be accepted as the arbitrator. Therefore I always look upon these arbitration clauses as in a business point of view a substantial portion of the contract, and I think the Courts have acted quite rightly in requiring good reason to be shewn why this part of a contract should not be strictly performed.

But, my Lords, it must be remembered that these arbitration clauses must be taken to have been inserted with due regard to the existing law of the land, and the law of the land as applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives to the Court the power to refuse its assistance in proper cases. Therefore to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe the position. We are carrying out the bargain between the parties, because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so enforced. Hence the task that is before a Court on an application of this kind appears to me to be the following:—It must recognize that the arbitration clause is not only a portion of the contract but that it is a portion which has influenced the conduct of the parties throughout the whole of the execution of the works. Were it not expected that the engineer would be the tribunal to decide on points arising in the execution of the works, much more elaborate precautions would be taken in the way of recording what has happened; the whole procedure of the parties would be changed;

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things would be done in a strictly legal form. But so long as the parties have full confidence in the engineer and are satisfied that he is making himself cognizant of all that happens in the construction of the works, much of that is unnecessary. Therefore the Court should start with an earnest desire to keep the parties to the domestic tribunal which was contemplated both in the contract and throughout the execution of the works. But, on the other hand, I do not think that the Legislature has ever made it incumbent on a Court to drive a man to a tribunal which would probably be unfair, however much he may have bound himself to accept it; and therefore the Court must ask itself whether it is fair for this man to be refused the assistance of the Court in settling his dispute. But the Court must always remember that the parties themselves are estopped from saying that the tribunal in its constitution is unfair, because it is the one which they accepted as the basis of the contract.

My Lords, I admit no secondary rules beyond the considerations to which I have referred. I think that in each case the Court is bound to consider all the circumstances. There may be something in the arbitrator which makes him an unfit person to be judge in the matter. It may be his personal conduct; it may be the position in which his actions have placed him. The Court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to the bargain, because those things must be supposed to have been in their contemplation at the time when they entered into the contract. Or, again, there may be questions which, though they are included in the wide and almost limitless words of the arbitration clause—(for I regret to see that these clauses are getting more and more complex, wider and wider words are added until the clauses are almost as shapeless and as incapable of a reasonable construction as the clauses we are accustomed to see in bills of lading)—there may be types of questions which, although included in the arbitration clauses, are types which presumably were not in the contemplation of the parties, and are not suitable from their nature to come before

this domestic tribunal. I do not cite these as exhausting the considerations which are legitimate for a Court to pay attention to in a case like this. It must consider all the circumstances of the case, but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where he will not get substantial justice.

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My Lords, in the present case I am not prepared to say that either of the two cases set forth in the affidavits is of such a type that a Court would necessarily be bound to refuse to stay the action. Not only is it easily conceivable, but I think I should expect, that in the progress of a long contract many questions would arise which were directly settled between the engineer and the parties; whether as to the rate of payment for a particular kind of work, or as to the plan to be pursued in its execution, or perhaps as to the setting off of one piece of work against another. All these things are details which are arranged in the course of the execution of the works, and I should turn a deaf ear to its being said that the engineer, with regard to such things, must to some extent be in the position of a witness. I think that one of the reasons why he is chosen is that he has a personal knowledge of the circumstances of the work, and, although there may be differences of recollection with regard to things which have occurred during the course of the execution, his personal acquaintance with the facts will in no wise hinder his being a good arbitrator if he is an honest man.

But in this case the way in which the disputes arose and what has happened in connection with them make me feel that a Court may well take the view that there is good reason why this matter should not be referred to arbitration as provided by the contract. I agree with the cases like *Walmsley v. White* (1) and *Joplin v. Postlethwaite* (2), which lay down that this is a matter of a judicial discretion for the Court. I find in this case that the Court of Appeal after a very long hearing has unanimously come to the conclusion that there are reasons why this claim should not be referred to arbitration, and the able arguments which your

(1) (1892) 67 L. T. 433.

(2) (1889) 61 L. T. 629

H. L. (E.) Lordships have heard have not convinced me that the Court of
 1913 Appeal was wrong in coming to that conclusion ; and therefore,
 BRISTOL without differing from the Court of Appeal in this but mainly
 CORPORATION from a feeling that on a question of judicial discretion one ought
 v. not lightly to allow an appeal from a Court which has not pro-
 JOHN AIRD ceeded on wrong judicial lines, I have come to the conclusion
 & Co. that the appellants have not made out their case, and I concur
 Lord Moulton in the motion which is about to be put to your Lordships.

LORD PARKER OF WADDINGTON. My Lords, I agree. The application in the present case was an application to stay proceedings under the 4th section of the Arbitration Act, 1889, which confers on the Court a discretionary power in that behalf ; but before exercising this power the Court has to be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. In making up its mind on this point the Court must of course give due consideration to the contract between the parties ; but it should, I think, always be remembered that the parties may have agreed to the submission precisely because of the discretionary power vested in the Court under the Arbitration Act. They may very well, for instance, have said to themselves, "If in any particular case it would be unfair to allow the arbitration we are agreeing to to proceed we shall have the protection of the Court."

My Lords, it appears to me that it is absolutely impossible to define, and certainly undesirable to attempt to define, with any precision what circumstances will prevent the Court from exercising its discretionary power. It will certainly not be enough to allege that the arbitrator is not an independent person, if the parties with knowledge that this is so have nevertheless agreed to accept him as arbitrator. But it may be a different matter altogether if by some action of his own the arbitrator has already irrevocably committed himself to some particular view ; and I think it is certainly a different matter altogether if there be a bona fide dispute involving substantial sums and a probable conflict of evidence on matters as to which the arbitrator himself will in the normal course be the principal witness on one side. In such a case it might lead to a miscarriage of justice if the

arbitration were allowed to proceed, and one of the parties were in consequence deprived of the chance of testing the truth by means of cross-examination, or if the arbitrator had to determine whether he had himself done anything by which one of the parties might be estopped from raising any particular point.

My Lords, in the present case, after what has been said by other noble Lords I do not think I need go into the particular circumstances, but in my opinion the matters at issue are of substance and the arbitrator is not unlikely to be a proper and necessary witness and questions of estoppel are not unlikely to arise. Not only therefore am I not satisfied that there is no reason why the matters at issue should not be referred, but I think on the whole that such reference might be very unfair to the respondents.

With regard to the contention of the appellants that the action should be allowed to proceed only with regard to the two points which were dealt with by the Court of Appeal, that contention was not put forward in the Court below, and the appellants have not given us any details of the other matters in dispute, so as to enable us to judge whether or not they can in fairness be left to the arbitrator. I do not think, therefore, that we ought to accede to that contention, more especially as it would involve a multiplicity of proceedings, in one of which the arbitrator will be the judge and in others of which he would probably be subject to cross-examination by one of the litigants.

My Lords, I should like to add one thing more. I do not think it is advisable that any doubt should be thrown upon what I personally know to be the practice of the Courts below, and in particular of the Chancery Division, with regard to exercising their discretion under the Arbitration Act. It is, I know, a common thing to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference; and I think it is obviously a desirable course in many cases, for this reason, that very often the matters subject to the reference include both the question of the true construction of the instrument containing the submission, and also various matters of detail, and it may be of account. Everybody knows that

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with regard to the construction of an agreement it is absolutely useless to stay the action, because it will only come back to the Court on a case stated; therefore it is more convenient on a question of construction to allow the action to proceed; and at the same time with regard to accounts and matters of detail to allow the arbitration to proceed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 13, 1913.

Solicitors for appellants: *Robins, Hay, Waters & Hay, for E. J. Taylor, Bristol.*

Solicitors for respondents: *Beale & Co.*

[PRIVY COUNCIL.]

RICKARDS (SINCE DECEASED) DEFENDANT ;

J. C.*

AND

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JOHN INGLIS LOTHIAN PLAINTIFF.

Dec. 2, 3.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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Action for Negligence—Proximate Cause of Damage—Malicious Act of Third Person—Reasonable Precautions—Overflow of Water from Lavatory in Upper Floor.

Feb. 11.

To sustain an action for negligence it must be shewn that the negligence found by the jury is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.

In an action for damages to property located on the second floor of a building leased to the defendant, through a continuous overflow of water from a lavatory basin on the top floor caused by the water tap having been turned on full and the waste-pipe plugged, the jury found that "this was the malicious act of some person":—

Held, (1.) that the defendant was not responsible unless either he instigated the act or the jury had found that he ought reasonably to have prevented it; (2.) that his having on his premises a proper and reasonable supply of water was an ordinary and proper user of his house, and that although he was bound to exercise all reasonable care he was not responsible for damage not due to his own default, whether caused by inevitable accident or the wrongful acts of third persons.

Rylands v. Fletcher (1868) L. R. 3 H. L. 330, distinguished.

APPEAL from an order of the High Court (May 22, 1911) reversing a judgment of the Supreme Court of Victoria (August 7, 1910) and restoring a judgment of the county court at Melbourne (April 29, 1910).

The respondent sued under circumstances which are fully detailed in the judgment of their Lordships for damage done to his stock in trade on the second floor of a building in the city of Melbourne by the overflow of water from a lavatory on the top floor caused by the tap being turned on for some considerable

* *Present*: VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD MOULTON.

J. C. time and the waste-pipe plugged so as to prevent its escape.
1912 The defendant appellant was lessee of the entire building, the
RICKARDS lavatory was used by his tenants, and the respondent was tenant
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The county court judge directed the jury that the appellant was not responsible for the deliberate malice or mischief of other persons whether in his employ or not. The jury found that the damage was caused by the defendant's negligence, but also that "this was the malicious act of some person."

The county court judge gave judgment for the respondent after interpreting these findings as amounting to this: "There was a malicious act, but the cause of the injury was the negligence of the defendant, without which this particular malicious act would not have caused the injury"; and he observed, "That view is consistent with the evidence," namely, "that some mischievous boy or girl may have done it, but that would not have caused the injury if a reasonable and proper escape had been allowed for the water."

The Supreme Court ordered that judgment should be entered for the appellant, "as the negligence was not the effective cause of the injury." It observed that "unless the defendant's negligence can be considered as having in some way caused or led up to the third person's act, the defendant will not be liable," and also that "a tap and basin, however badly equipped against overflow, cannot be regarded as inciting or suggesting mischievous or malicious interference with them unless perhaps they are provided for lunatics or set in a place frequented by lunatics."

Cussen J. dissented and was of opinion that "a jury might find in the circumstances that a reasonably careful man would have anticipated and provided against an overflow, whether caused by accident or by the negligence or wilful act of a stranger," and "that the absence of some other precaution, such as a lead safe, amounted to negligence."

In the High Court of Australia the majority were of opinion that it was open to the jury upon the evidence to find, as they did, that the appellant's negligence was the cause of the damage, and that their further finding was irrelevant. The defendant's liability for the third party's act did not depend upon his motive

or intention, but upon the nature of the act which was the primary cause of the injury. "If it was such that the defendant might reasonably have anticipated it was likely to happen, it is immaterial whether it was accidental or negligent or malicious." Isaacs J. dissented, being of opinion that, without very special circumstances (which, in his opinion, did not exist), the landlord could not "be expected to anticipate such a gross misuse of the lavatory as making it an instrument of maliciously swamping the building."

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Dickens, K.C., and *C. W. Williams*, for the appellants, contended that upon the findings of the jury judgment should have been entered for the defendant. The jury had been properly directed by the county court judge that the defendant would not be responsible for damage caused by the malicious act of some third person. It then found that the damage had been so caused, and it followed that the verdict should have been entered for the defendant. With regard to the finding as to negligence, especially referring to the absence of a lead safe, which it is found would have minimized the risk of overflow, it was contended that the suggested precaution related solely to an overflow resulting from accident or negligence. The finding was totally irrelevant if the overflow resulted from the malicious act of an outsider. There was no evidence given of any duty which the defendant had omitted, or of any negligence on his part, still less of any negligence which was the effective cause of injury to the plaintiff. It was proved by the evidence and found by the jury that it was caused by the wilful act or default of some malicious person unknown, and it followed that the defendant, in the absence of any evidence or finding that he had instigated or contributed thereto, was not responsible. No circumstances were in evidence, and no finding was even asked by the plaintiff, to the effect that this malicious act was one which from its nature could have been reasonably anticipated and provided against. It was contended that the dissentient judgment of Isaacs J. was correct and it was observed that none of the judgments in the High Court dealt with the case of *Rylands v. Fletcher*. (1) Reference was made to

(1) L. R. 3 H. L. 330.

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on and in omitting to discover that the waste-pipe was choked; and, secondly, that the defendant was guilty of negligence in not placing a lead safe with an outlet pipe on the floor of the lavatory underneath the basin. Smith was called as a witness on behalf of the defendant and gave evidence that the basin was in proper condition when he left it on the evening before, and the tap turned off, and, as will presently be seen, the jury accepted his evidence. With regard to the second point, namely, whether it was necessary or usual to put a lead safe in such a lavatory, the evidence was very conflicting, the views of the various expert witnesses called for the parties differing widely.

The learned judge summed up very carefully and at considerable length, calling the attention of the jury to the whole of the evidence given. In the course of his summing up he directed them that "if this" (i.e., the plugging up) "were a deliberately mischievous act by some outsider, unless it were instigated by the defendant himself, the defendant would not be responsible. He would not be responsible for a malicious act under those circumstances, because he could not guard against malice." This direction was in substance repeated in that part of the summing up which dealt with the question of the necessity of placing a lead safe in the lavatory. Referring to the contention of the defendant that the damage was caused not by the absence of a safe but by deliberate mischief, he said: "If it was, then the defendant would not be responsible because the person who deliberately tried to flood the place could overcome the precautions. He could stop the plug of the basin, he could stop the overflow, and could very easily stop the escape from the lead floors. Nobody is expected to guard against deliberate malice or mischief."

At the end of the summing up the judge handed the following written paper to the jury:—

"Questions for the jury. To be taken in reference to the evidence and the judge's direction.

"(1.) Was the defendant, or any of his servants or agents, guilty of negligence?

"(a) In not providing a reasonably sufficient escape for water in case of an overflow resulting from accident or negligence, having regard to the nature of the use of the rooms beneath?

“(b) In leaving the tap turned on on the night of the 18th August, 1909, or in omitting to discover on that night that the waste-pipe was choked ?

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“(2.) Was such negligence (if any) the cause of the injury to plaintiff's goods ?

“(3.) Damages, in any case ? ”

and the jury returned the following written answers :—

“(1.) Yes.

“(a) We are of opinion that a lead safe was necessary on the floor of this particular lavatory, and that same would minimize risk.

“(b) No. We believe the evidence of Smith (caretaker), who asserts that the lavatory was in thorough order when he ceased duties.

“(2.) Yes, it was.

“(3.) We assess the damage done to Lothian's property at 156*l*.

“We are of opinion that this was the malicious act of some person.”

The paper also shewed the calculation by which the sum of 156*l*. was arrived at, which is omitted as not being relevant for the purpose of this appeal. It shews that the damages were calculated on the basis of compensating for the whole of the damage to the plaintiff's stock through the flooding.

These questions were not happily framed. For example, the word “negligence” in 1 (a) is used twice, and evidently refers to two different things in the two places where it occurs. In the earlier part of the question it must refer to negligence in the construction of the apparatus, but in the latter part it must refer to negligence in user. But this is not the most serious defect in these questions. There is also a fatal omission. The judge had directed the jury that if the act was malicious the defendant would not be liable unless he instigated it, which was not even suggested. Yet this issue was not put to them, nor, indeed, was any question asked bearing upon it. It is evident that this omission puzzled the jury. The course they took was, on the whole, one directed by common sense. They found a verdict upon that vital issue, although it had not been separately left to them, and they then proceeded to answer the questions

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connected by a pipe with the mains of the Metropolitan Water Supply System. The basin had the usual arrangements for getting rid of the water, namely, a vent-hole provided with a plug at the bottom of the basin and holes situated near its upper edge to act as an overflow. Through these holes the overflowing water passed down a pipe which connected with the waste-pipe from the hole at the bottom of the basin, some little distance below its upper end. It was common ground that the basin and fittings above described were of ordinary construction and such as are in common use, and it was proved that on their erection they had been inspected and passed by the officials of the Metropolitan Board of Works in the regular way. The lavatory was intended for the use of the tenants of the upper floors and persons in their employment.

The defendant employed one Smith as a caretaker of the building, and part of his business was to see that the lavatory was in good working order. On August 18, 1909, he was on duty until 10.20 P.M. He gave evidence that at that hour he went to the lavatory and found it in proper order. On the plaintiff arriving on the premises the following morning he found that his stock in trade there (which consisted mainly of school-books) was seriously damaged by water, and on examination it was discovered that the water tap of the basin had been turned full on and the waste-pipe plugged so that there had been an overflow from the basin to the extent of the full supply which the tap was capable of giving, and that this overflow had flooded the rooms below. There was no direct evidence as to the length of time that the water had been running in this way, but the extent of the overflow was so great that it seems to have been accepted by all parties at the trial that it must have continued for some hours. It was for the damage thus caused to the plaintiff's stock in trade that the action was brought.

On examining the basin it was found that the waste-pipe had been plugged up with various articles, such as nails, penholders, string, and soap, and that the obstruction was situated so far down the pipe that it covered its junction with the waste-pipe from the overflow holes. It therefore blocked both waste-pipes. The manner in which the plugging was effected furnished strong

evidence that it had been intentionally done; indeed, the materials had been so tightly rammed together that it was difficult to clear the pipe. For the purposes of the trial the capacity of the waste-pipes for carrying off the water which the tap was capable of supplying was tested after the pipe had been cleared. It was found that at the ordinary pressure of the system during the daytime the waste-pipes were able to carry off all the water which the tap could supply even when fully open, but that during the night the pressure rose somewhat and that at the night pressure the waste-pipes were not sufficient to take off the whole of the water which the tap could supply. The plaintiff gave no evidence to shew what fraction of the water which the tap was capable of so supplying during the night would fail to pass away by the waste-pipes if they were clear and unobstructed, but it would seem probable that the amount of the overflow in such circumstances would only be a comparatively small fraction of the water issuing out of the tap and that the major portion would pass off by the waste-pipes.

In his plaint the plaintiff claimed to recover the damage done to his stock in trade as injury caused by water through the carelessness of the defendant, his servants or agents, in the construction, maintenance, management, and control of the lavatory basin and its pipes, &c., and alternatively as injury arising from a breach by the defendant of an implied covenant for quiet enjoyment. At the trial he was permitted to add a third alternative whereby he claimed to recover such damage as injury caused by the defendant wrongfully permitting large quantities of water to escape from the said basin and to flow into the premises occupied by the plaintiff. By his defence the defendant denied the allegations of negligence, covenant, and duty, and further denied that if any such covenant existed there had been any breach of it.

At the trial evidence was called on both sides and the above facts were proved. The claim upon implied covenant was obviously unsustainable and was apparently abandoned. The substantial case sought to be made on behalf of the plaintiff was twofold—first, that Smith (for whose actions the defendant was responsible) was guilty of negligence in leaving the tap turned

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on and in omitting to discover that the waste-pipe was choked; and, secondly, that the defendant was guilty of negligence in not placing a lead safe with an outlet pipe on the floor of the lavatory underneath the basin. Smith was called as a witness on behalf of the defendant and gave evidence that the basin was in proper condition when he left it on the evening before, and the tap turned off, and, as will presently be seen, the jury accepted his evidence. With regard to the second point, namely, whether it was necessary or usual to put a lead safe in such a lavatory, the evidence was very conflicting, the views of the various expert witnesses called for the parties differing widely.

The learned judge summed up very carefully and at considerable length, calling the attention of the jury to the whole of the evidence given. In the course of his summing up he directed them that "if this" (i.e., the plugging up) "were a deliberately mischievous act by some outsider, unless it were instigated by the defendant himself, the defendant would not be responsible. He would not be responsible for a malicious act under those circumstances, because he could not guard against malice." This direction was in substance repeated in that part of the summing up which dealt with the question of the necessity of placing a lead safe in the lavatory. Referring to the contention of the defendant that the damage was caused not by the absence of a safe but by deliberate mischief, he said: "If it was, then the defendant would not be responsible because the person who deliberately tried to flood the place could overcome the precautions. He could stop the plug of the basin, he could stop the overflow, and could very easily stop the escape from the lead floors. Nobody is expected to guard against deliberate malice or mischief."

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These questions were not happily framed. For example, the word “negligence” in 1 (a) is used twice, and evidently refers to two different things in the two places where it occurs. In the earlier part of the question it must refer to negligence in the construction of the apparatus, but in the latter part it must refer to negligence in user. But this is not the most serious defect in these questions. There is also a fatal omission. The judge had directed the jury that if the act was malicious the defendant would not be liable unless he instigated it, which was not even suggested. Yet this issue was not put to them, nor, indeed, was any question asked bearing upon it. It is evident that this omission puzzled the jury. The course they took was, on the whole, one directed by common sense. They found a verdict upon that vital issue, although it had not been separately left to them, and they then proceeded to answer the questions

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specifically put to them. As their language shews, these questions related solely to the issue of negligence—the first asking as to its existence, the second as to the damage being a consequence of it, and the third as to the amount of that damage. It is difficult to understand the answer of the jury to the second question, in view of the finding that the act was malicious, because if the act was malicious the negligence in not providing the lead safe could not be, legally speaking, the cause of the damage. But there can be no doubt of the meaning of the finding as to the act having been malicious, and therefore their Lordships consider that the only reasonable interpretation to be put upon the answer to the second question is that the jury thought that the negligence in omitting to provide a lead safe was physically the cause of the damage in the sense that the provision of a lead safe would have prevented the damage if the overflow had been due to negligence or accident.

Their Lordships are of opinion that there was abundant evidence to support the finding of the jury that the plugging of the pipes was the malicious act of some person, and indeed it is difficult to see how upon the evidence any other conclusion could reasonably have been arrived at. The answers to question 1 (a) and (b) were also answers which the jury were competent to give upon the evidence, and no objection can be taken to them. By their answer to 1 (a) the jury shew that they appreciated in an exceptionally clear way the nature of the question for their decision. In the face of the evidence as to its being an ordinary practice not to have such lead safes, and as to the lavatory being of ordinary construction and approved of by the water authorities, it would have been difficult, if not impossible, to give any finding of general application as to the duties of a house owner with regard to water fittings of this kind. Indeed, no such general finding could as a matter of law be sustainable. The degree to which it is incumbent upon a householder to provide automatic protection against careless user must depend on the nature of the user. In a laboratory for instance, where the fitting would only be used by trained persons in the course of careful scientific work, such automatic safeguards against overflow might not be needed, whereas in a lavatory, where the user was more

indiscriminate, it might be reasonable to have elaborate protective devices. But in this case the jury viewed the place, and their finding is a cautious one entirely within their competence. They found that it was negligent to omit to provide a lead safe on the floor of this particular lavatory. Their Lordships are satisfied that a finding so express and so carefully limited cannot be impugned.

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It is clear that on these findings the plaintiff did not make good his claim as a claim in an ordinary action of negligence. To sustain such a cause of action it must be shewn that the negligence is the proximate cause of the damage. The proximate cause of the damage here was the malicious act of a third person. The only negligence which the jury found in this case was the omission to provide against accident by placing a lead safe under the lavatory. Such automatic devices are security against accident or negligent user, but they are inoperative against intentional and mischievous acts. The person who did the malicious act in this case was obliged to do three distinct things to secure the success of his plan, namely, to open the screw tap to its utmost limit, to block the waste-pipe from the bottom of the basin, and to block the waste-pipe from the overflow holes. It cannot be doubted that the presence of a lead safe would have formed no obstacle to his plan, because the outlet from that safe could have been blocked up as easily as the two waste-pipes. The arguments on behalf of the plaintiff in the Courts of Appeal were therefore mainly directed to bringing the case under one of two other well-known types of action, namely:—

(1.) It was contended that the defendant ought to have foreseen the probability of such a malicious act and to have taken precautions against it, and that he was liable in damages for not having done so.

(2.) It was contended that the defendant was liable apart from negligence on the principles which are usually associated with the well-known case of *Fletcher v. Rylands*. (1)

In the argument on the first of these points, *Lynch v. Nurdin* (2), *Cooke v. Midland Great Western Railway of*

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) (1841) 1 Q. B. 29.

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Ireland (1), and other decisions of the same type were relied upon. There is, however, a short and conclusive answer to this contention. To make good such a cause of action the plaintiff must shew that the defendant ought to have reasonably anticipated the likelihood of a deliberate choking of the pipe so that it became his duty to take precautions to prevent such an act causing damage to others. This is an issue of fact in which the burden is upon the plaintiff, and he has obtained no finding from the jury in support of it. It is perhaps irrelevant to consider who is responsible for this omission, because it is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury. But in this case the defendant specifically requested the judge to put the question whether the defendant ought reasonably to have anticipated the deliberate choking of the pipe, and the plaintiff's counsel did not support the request, but accepted the questions framed by the judge. The absence of this finding is fatal to this part of the plaintiff's case, and it is not necessary, therefore, to inquire into it further. But it must be pointed out that there was no evidence which could have supported such a finding, and, moreover, that the only duty incumbent upon the defendant in such a case would have been to take reasonable precautions to prevent such an act causing damage, and throughout the whole of the case there was no suggestion of any precaution which would have had that effect; nor was there any finding by the jury that the defendant had in this respect omitted to do anything which he should have done. The only omission found against him was of something wholly irrelevant from this point of view. It is impossible, therefore, to support the plaintiff's claim so far as it is based upon the legal principles illustrated by the above class of cases.

The principal contention, however, on behalf of the plaintiff was based on the doctrine customarily associated with the case of *Fletcher v. Rylands*. (2) It was contended that it was the defendant's duty to prevent an overflow from the lavatory basin, however caused, and that he was liable in damages for not having

(1) [1909] A. C. 229.

(2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

so done, whether the overflow was due to any negligent act on his part or to the malicious act of a third person.

The legal principle that underlies the decision in *Fletcher v. Rylands* (1) was well known in English law from a very early period, but it was explained and formulated in a strikingly clear and authoritative manner in that case and therefore is usually referred to by that name. It is nothing other than an application of the old maxim "Sic utere tuo ut alienum non lædas." The defendants in that action had constructed a reservoir on their land to collect and hold water for the purpose of working their mill. Under that land were situated underground workings of an abandoned coal mine the existence of which was unknown to everybody. After the reservoir had been filled the water found its way down to those underground workings through some old shafts and escaping through them flooded the plaintiff's colliery. The defendants had been guilty of no negligence either in the construction or use of the reservoir, and they contended that in the absence of negligence they were not liable. The plaintiff contended on the other hand that the defendants having brought and stored the water upon their land for their own purposes were bound to keep it safely there, and that if it escaped to adjoining lands and did damage the defendants were liable for the breach of this duty whether or not it was due to negligence.

The argument took place on a special case stated by an arbitrator setting forth the facts and the contentions of the parties. It was heard in the first instance before the Court of Exchequer, which by a majority decided in favour of the defendants, Bramwell B. dissenting. Error was brought from this judgment, and the Court of Exchequer Chamber (consisting of Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush JJ.) reversed the decision of the Court of Exchequer by a unanimous judgment which was read by Blackburn J. On appeal to the House of Lords the judgment of the Exchequer Chamber was affirmed; both Cairns L.C. and Lord Cranworth (who delivered the judgments on the hearing of the appeal) expressly approving of Blackburn J.'s statement of the law on the subject in the judgment appealed from. The formulation of the

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principle which is to be found in that judgment is therefore of the highest authority as well from the fact that it received the express approval of the ultimate tribunal as from the eminence of the judges who took part in the decision.

So far as is necessary for the present case the law on the point is thus laid down by Blackburn J.: "We think that the true rule of the law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

It will be seen that Blackburn J., with characteristic carefulness, indicates that exceptions to the general rule may arise where the escape is in consequence of *vis major*, or the act of God, but declines to deal further with that question because it was unnecessary for the decision of the case then before him. A few years later the question of law thus left undecided in *Fletcher v. Rylands* (1) came up for decision in a case arising out of somewhat similar circumstances. The defendant in *Nichols v. Marsland* (2) had formed on her land certain ornamental pools which contained large quantities of water. A sudden and unprecedented rainfall occurred, giving rise to a flood of such magnitude that the jury found that it could not reasonably have been anticipated. This flood caused the lakes to burst their dams, and the plaintiff's adjoining lands were flooded. The jury found that there was no negligence in the construction or maintenance of the lakes. But they also found that if such a flood could have been anticipated the dams might have been so constructed that the flooding would have been prevented. Upon these findings the judge at the trial directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. On the argument of the rule the Court of Exchequer directed the verdict to be entered for

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) 2 Ex. D. 1.

the defendant, and on appeal to the Exchequer Chamber that judgment was unanimously affirmed.

The judgment of the Court of Exchequer Chamber (Cockburn C.J., James and Mellish L.JJ., and Baggallay J.A.) was read by Mellish L.J. After pointing out that the facts of the case rendered it necessary to decide the point left undecided in *Fletcher v. Rylands* (1), he proceeds to lay down the law thereupon in the following language: "... the ordinary rule of law is that when the law creates a duty, and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands v. Fletcher* (1) establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitutes a wrong. But the present case is distinguished from that of *Rylands v. Fletcher* (1) in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would

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have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion therefore that the defendant was entitled to excuse herself by proving that the water escaped through the act of God."

Their Lordships are of opinion that all that is there laid down as to a case where the escape is due to "vis major or the King's enemies" applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. To follow the language of the judgment just recited—a defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.

It is remarkable that the very point involved in the present case was expressly dealt with by Bramwell B. in delivering the judgment of the Court of Exchequer in the same case. He says: "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong. She has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that if it was let loose it would do as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? . . . I admit that it is not a question of negligence. A man may use all care to keep the water in . . . but would be liable if through any defect, though latent, the water escaped. . . . But here the act is that of an agent he cannot control."

[Following the language of this judgment their Lordships are of opinion that no better example could be given of an agent that the defendant cannot control than that of a third party surreptitiously and by a malicious act causing the overflow.

The same principle is affirmed in the case of *Box v. Jubb*. (1) In that case the defendants had a reservoir on their land which was connected both for supply and discharge with a watercourse or main drain. Through the sudden emptying of another reservoir into the drain at a higher level than their reservoir and by the blocking of the main drain below, the defendants' reservoir was made to overflow, and damage was done to the lands of the plaintiff. The defendants were guilty of no negligence either in the construction or maintenance of the reservoir, and the acts which led to its overflow were done by persons over whom they had no control. In giving judgment Kelly C.B. says: "The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible? Did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose."

Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable on the principle of *Fletcher v. Rylands* (2) for damage caused by the wrongful acts of third persons.

But there is another ground upon which their Lordships are of

(1) (1879) 4 Ex. D. 76.

(2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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opinion that the present case does not come within the principle laid down in *Fletcher v. Rylands*. (1) It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of Lord Robertson in *Eastern and South African Telegraph Co. v. Cape Town Tramways Companies* (2), the principle of *Fletcher v. Rylands* (1) "subjects to a high liability the owner who uses his property for purposes other than those which are natural." This is more fully expressed by Wright J. in his judgment in *Blake v. Woolf*. (3) In that case the plaintiff was the occupier of the lower floors of the defendant's house, the upper floors being occupied by the defendant himself. A leak occurred in the cistern at the top of the house which without any negligence on the part of the defendant caused the plaintiff's premises to be flooded. In giving judgment for the defendant Wright J. says: "The general rule as laid down in *Rylands v. Fletcher* is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue."

This is entirely in agreement with the judgment of Blackburn J. in *Ross v. Fedden*. (4) In that case the defendants were the

(1) L. R. 1 Ex. 265; L. R. 3 H. L.

(2) [1902] A. C. 393.

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(3) [1898] 2 Q. B. 426.

(4) (1872) L. R. 7 Q. B. 661.

occupiers of the upper floor of a house of which the plaintiff occupied the lower floor. The supply and overflow pipes of a water-closet which was situated in the defendants' premises and was for their use and convenience got out of order and caused the plaintiff's premises to be flooded. Negligence was negatived. In giving judgment in favour of the defendants Blackburn J. says: "I think it is impossible to say that defendants as occupiers of the upper storey of a house were liable to the plaintiff under the circumstances found in the case. The water-closet and the supply pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is that the plaintiff and defendants being occupiers under the same landlord, the defendants being the occupiers of the upper storey, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril. I do not agree to that; I do not think the maxim, 'Sic utere tuo ut alienum non lædas' applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the pipe and valve and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for."

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Their Lordships are in entire sympathy with these views. The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its

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bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the province."

The said railway company was incorporated by Alberta Act 46 of 1909, and empowered thereby to issue bonds which by Alberta Act 16 of 1909 the provincial Government was empowered to guarantee under arrangements which were duly carried into effect. The proceeds of the bonds which were realized in London were, in accordance with the terms of the construction contract between the railway company and the appellant construction company (which had been incorporated by the Dominion with its head office outside the province), to be paid into certain banks approved by the provincial Government. Thereunder the proceeds were credited to the Provincial Treasurer in a special railway account opened at the Alberta branch of the appellant bank and paid out on instructions received by the branch from the head office, which retained the control. By Order in Council dated November 9, 1909, the sum of \$6,000,000 the subject of this suit was directed to be paid into the appellant bank.

On December 16, 1910, the provincial Legislature, under circumstances which are fully detailed in the judgment of their Lordships, passed the Act whose validity is the subject of appeal. After recitals (the truth of which was not admitted) that the railway company had made default in construction and in payment of interest on the bonds, contained provisions to the following effect:—

(a) The said guarantee (i.e., the guarantee of the bonds) was ratified and confirmed.

(b) The proceeds of the sale of the bonds and interest thereon then standing in certain banks (including \$6,000,000 in the appellant bank) were declared to form part of the general revenue fund of the Province of Alberta free and clear of any claim thereon or thereto by the railway company, their successors or assigns, and it was enacted that such deposit together with all accrued interest should to the extent to which it was so held be paid to the Treasurer of the province without any set-off, counter-claim, or other deduction whatsoever.

(c) The Province of Alberta should as between itself and the railway company be primarily liable upon the said bonds to the several holders thereof, and the province should indemnify the railway company, its assets and undertaking, from any claim under the said bonds.

On the same day that the Act was passed the Provincial Treasurer claimed payment from the appellant bank in accordance with the Act, and on refusal an action was brought by the Attorney-General of Alberta on behalf of the Crown and the Provincial Treasurer for the recovery of the amount in deposit with the said bank. The railway and construction companies were afterwards added as defendants on their own application for the purpose of enabling them to resist payment.

They contended that the Act was ultra vires the Alberta Legislature because

- (1.) it affected property and civil rights outside the province ;
- (2.) it was essentially a banking Act within the exclusive legislative authority of the Dominion ;
- (3.) it was confiscatory and attempted to raise revenue in a manner other than by direct taxation within the province.

Stuart J. decreed in favour of the plaintiffs that they recover from the bank the full amount claimed with interest. He was of opinion that the statute of 1910 was upon a matter of local concern, the proceeds of the bonds being within the province at the time the statute was passed, which was therefore authorized by enumeration 16 of s. 92 of the British North America Act. He was further of opinion that the statute was not a banking statute, and he observed that it was utterly unreasonable to say that moneys raised on the security of the province and intended by the Legislature to be devoted by the company whose bonds were secured to the construction of a railway in the province could not be diverted by an Act of the Legislature to another purpose because those moneys had for convenience been deposited in a bank on the ground that such an Act would be banking legislation.

The Supreme Court en banc dismissed an appeal from this judgment with costs. Harvey C.J. was of opinion that the statute was probably authorized by enumerations 10 and 16 of

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s. 92 of the British North America Act, but certainly fell within enumeration 13 of that section having regard to the decision of His Majesty in Council in *Rex v. Lovitt*. (1) He also agreed with Stuart J. that the Act was not banking legislation.

On the question whether the Act was ultra vires because confiscatory, the Chief Justice, after referring to *Reg. v. Burah* (2), *Dobie v. Temporalities Board* (3), *Hodge v. Reg.* (4), *Powell v. Apollo Candle Co.* (5), and *Attorney-General for Canada v. Attorneys-General for Provinces* (6), held that it was clear that the right to confiscate private property over which the province has jurisdiction belongs to the province; and that the function of the Court was to determine the legal and not the moral validity of the Act.

All the defendants appealed.

Sir R. Finlay, K.C., R. B. Bennet, K.C., J. H. Moss, K.C., and W. Finlay, for the appellants, contended that the Act in question was ultra vires the provincial Legislature. Its subject-matter does not fall within any of the classes enumerated in s. 92 of the British North America Act, 1867. Its powers to raise money are by that section limited to direct taxation within the province, borrowing on the sole credit of the province, management and sale of public lands, and the issue of licences. The method adopted in this case was mere confiscation, which was not authorized by the Act of 1867: see the dictum of Lord Watson in *Dobie v. Temporalities Board*. (7) The Chief Justice, it was submitted, was wrong in saying that the effect of that judgment was weakened by subsequent cases and that it must be limited to the particular circumstances of the *Dobie Case* (3) or to property of companies carrying on business under Dominion authority. It was contended that the power to confiscate was excluded altogether and that the powers of raising revenue granted by s. 92 were exhaustive. Reference was made to *Attorney-General of Ontario v. Mercer* (8); *Citizens Insurance Co. v.*

(1) [1912] A. C. 212.

(2) (1878) 3 App. Cas. 889.

(3) (1882) 7 App. Cas. 136.

(4) (1883) 9 App. Cas. 117.

(5) (1885) 10 App. Cas. 282.

(6) [1898] A. C. 700.

(7) 7 App. Cas. 136, at p. 151.

(8) (1883) 8 App. Cas. 767, 774, 775.

Parsons. (1) The Act, moreover, was ultra vires inasmuch as its provisions were not limited to property and civil rights within the province, but affected the legal rights of many persons outside the province. At the time it was passed the situs of both debtor and creditor in respect of the money deposited was outside the province; and on the evidence neither the profits nor the civil rights which were dealt with by the Act were within the Province of Alberta or the jurisdiction of its Legislature. The creditors in the case were the bondholders and their trustee. The moneys deposited in the approved banks were held in trust for them to remain upon special account till paid out for construction purposes and then to be converted into assets of the railway company covered by the mortgage in favour of the said trustee. In either shape, whether as money deposited or as railway, it was security to the bondholders abroad and could not be taken from them by the provincial Legislature and appropriated to its own purposes. The debtor also was outside the province. The head office of the bank was in Montreal, and the deposit in question being large in amount and unusual in character was always under the control of the Montreal head office, and though the special account was kept at a local branch within the province, no withdrawals were allowed without authority from the head office, which retained complete control of the fund. The appellant bank was liable to its creditor at its head office, and his claim could be enforced in the Courts either of Quebec or New York. This case was distinguished from that of *Rex v. Locitt* (2) relied upon by the Chief Justice. The head office of the bank in that case knew nothing of the depositor, the deposit receipt was signed by the branch manager, and the depositor dealt exclusively with the branch bank and not with the head office. In this case it was contended that, even if the legislation was competently enacted, it could not have extra-territorial operation or affect any property or civil rights beyond the territorial limits of the province. It did not purport to put an end to the contracts of construction and guarantee. The obligations thereunder are still enforceable and the proceeds of the bonds are held subject

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(1) (1881) 7 App. Cas. 96, 106, 109.

(2) [1912] A. C. 212.

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thereto. Otherwise the bondholders are entitled to a return of their moneys which they have advanced for a purpose which has failed. The effect of the Act was to convert a special deposit which was conditionally payable to the depositor or to be invested for his benefit into an unconditional deposit payable on demand to a person other than the depositor. Reference was made to *Attorney-General v. Alexander* (1); *Prince v. Oriental Bank Corporation* (2); *De Beers Consolidated Mines, Ltd. v. Howe* (3); *McGregor v. Esquimalt and Nanaimo Railway* (4); *Woodruff v. Attorney-General for Ontario* (5); *Bank of Toronto v. Lambe* (6); *Attorney-General for Quebec v. Reed* (7); *Tennant v. Union Bank of Canada* (8); *Grand Trunk Railway of Canada v. Attorney-General of Canada* (9); *Madden v. Nelson and Fort Sheppard Railway* (10); *Toronto Corporation v. Bell Telephone Co. of Canada*. (11)

Buckmaster, K.C., C. A. Marten, K.C., and Geoffrey Lawrence, for the respondents, contended that the appellant bank was a debtor to the Province of Alberta as its customer and that c. 9 of the Alberta Statutes for 1910 imposed upon the appellant bank a legal obligation to pay to the respondents the amount in suit. That statute was authorized by s. 92 of the British North America Act, and especially by enumerations 10, 13, and 16, and was one step in a series of enactments relating exclusively to a local work and undertaking within the Province of Alberta. The property and civil rights dealt with by the Act are within the province, and the latter are enforceable in the province and according to the law of the province. The expression property and civil rights should receive a wide construction: see *Citizens Insurance Co. v. Parsons* (12); *McGregor v. Esquimalt and Nanaimo Railway*. (4) It was contended that all property, real or personal, and all civil rights within the limits of Alberta are subject to Alberta legislation. The property and

(1) (1874) L. R. 10 Ex. 20.

(2) (1878) 3 App. Cas. 325.

(3) [1906] A. C. 455.

(4) [1907] A. C. 462.

(5) [1908] A. C. 508, 513.

(6) (1887) 12 App. Cas. 575, 581.

(7) (1884) 10 App. Cas. 141.

(8) [1894] A. C. 31.

(9) [1907] A. C. 65.

(10) [1899] A. C. 626.

(11) [1905] A. C. 52, 56.

(12) 7 App. Cas. 96.

civil rights dealt with by the Act in question were property and civil rights within the province, and that was the decisive consideration in the case. The evidence shewed that the deposit was in pursuance of an agreement to that effect made in the appellants' branch bank at Edmonton in the province under the Guarantee Act (16 of 1909), and that it was a condition of the delivery up of the bond in suit that it should be so made. The circumstance that persons outside the province had rights which were affected by the Act in question did not render the legislation invalid. So long as the property affected by the Act is situated within the province it is immaterial that the owner or other persons affected thereby are outside the province. If the property so affected were land situate within the province, legislation regarding it would not be invalid so far as it affected the interests of an owner outside the province, and in that regard no material distinction can be drawn between landed property and the fund in question in this case. The control of the Legislature over the fund is as complete as it would have been over land.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the Legislature of Alberta passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, to recover \$6,042,083.26, with interest, being the amount of the deposit held by the appellant bank. The Court of first instance and the Court of Appeal of the province have given judgment for the Government.

It is contended by the appellants that the statute in question was not validly enacted. It is said to have been ultra vires of

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(1) (1874) L. R. 10 Ex. 20.

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(3) [1906] A. C. 455.

(4) [1907] A. C. 462.

(5) [1908] A. C. 508, 513.

(6) (1887) 12 App. Cas. 575, 581.

(7) (1884) 10 App. Cas. 141.

(8) [1894] A. C. 31.

(9) [1907] A. C. 65.

(10) [1899] A. C. 626.

(11) [1905] A. C. 52, 56.

(12) 7 App. Cas. 96.

civil rights dealt with by the Act in question were property and civil rights within the province, and that was the decisive consideration in the case. The evidence shewed that the deposit was in pursuance of an agreement to that effect made in the appellants' branch bank at Edmonton in the province under the Guarantee Act (16 of 1909), and that it was a condition of the delivery up of the bond in suit that it should be so made. The circumstance that persons outside the province had rights which were affected by the Act in question did not render the legislation invalid. So long as the property affected by the Act is situated within the province it is immaterial that the owner or other persons affected thereby are outside the province. If the property so affected were land situate within the province, legislation regarding it would not be invalid so far as it affected the interests of an owner outside the province, and in that regard no material distinction can be drawn between landed property and the fund in question in this case. The control of the Legislature over the fund is as complete as it would have been over land.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the Legislature of Alberta passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, to recover \$6,042,083.26, with interest, being the amount of the deposit held by the appellant bank. The Court of first instance and the Court of Appeal of the province have given judgment for the Government.

It is contended by the appellants that the statute in question was not validly enacted. It is said to have been ultra vires of

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the Legislature of the province as attempting to interfere with property and civil rights outside the province, and also as trenching on the field of legislation as to banking, which, by s. 91 of the British North America Act, is reserved to the Parliament of Canada. It is further said that inasmuch as the statute purported to make the deposits part of the general revenue fund of the province, it was inoperative as being an attempt to raise revenue for provincial purposes in a manner not authorized by s. 92 of that Act. In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed.

The appellant railway company was incorporated by an Act of the Legislature of the province, being c. 46 of 1909, for the purpose of constructing and operating a railway to extend from Edmonton in a north-easterly direction, and to be wholly within the province. The capital was to be \$7,000,000, and the company was empowered to issue bonds. By another Act of the same session, being c. 16, which received the Royal assent on the same day, February 25, the Government of Alberta was authorized to guarantee the principal and interest of the bonds to be issued by the railway company to the extent of \$20,000 a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of 5 per cent. By s. 2 it was provided that the bonds so guaranteed were to be secured by mortgage to be made to trustees, which was to cover the railway, its rolling stock and equipment, and its revenues, rights, and powers. By s. 3 the form and terms of the bonds, mortgage, and guarantees were to be approved by the Lieutenant-Governor in Council. By s. 4, when the guarantees were signed on behalf of the Government, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By s. 5 all moneys realized by sale, pledge, or otherwise of the bonds were to be paid by the purchaser, subscriber, pledgee, or lender into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the Treasurer of

the province, or such other credit as the Lieutenant-Governor in Council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the company and the bank holding the same, and such balance was from time to time to be paid out to the company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor in Council according to specifications to be fixed by contract between the Government and the company and in such sums as an engineer appointed by the Lieutenant-Governor in Council should certify as justified, provided that at the option of the company the moneys so paid into the bank should, instead of being so paid out, be paid to the company on the completion, as certified by the engineer to the satisfaction of the Lieutenant-Governor in Council, of sections and terminals specified. The balance of the proceeds of the bonds which might remain after completion of the railway was to be paid over to the company or its nominee. Sect. 5 concluded with a provision, which appears to have been inaccurately printed, but which their Lordships interpret as bearing the meaning put on it in an Order in Council subsequently made by the Lieutenant-Governor on October 7, 1909, that the balance at the credit of the special account remaining until paid out as above arranged for was to be deemed part of the mortgaged premises under the mortgage, and not public moneys received by the province.

On October 7 two Orders in Council were made by the Lieutenant-Governor. The first of these, after reciting the Incorporating Act and the Guarantee Act above referred to, approved forms of mortgage and a guarantee, authorized the proper officials to execute them, and designated the Standard Trusts Company as the trustee under the mortgage deed. This Order also, pending the preparation of engraved bonds, authorized the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, \$7,400,000, to be exchanged for the engraved bonds in due course. By the second

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of these Orders, after reciting that the company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the appellant bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act. By an Order made on November 9 the list of banks was varied, but the appellant bank remained included, and the deposit out of the proceeds of the bonds of \$6,000,000, being the principal included in the amount sued for, was assigned to it. This Order recited that it was the understanding of the Government that on the proper interpretation of the last-mentioned Act the moneys in question, when paid into the banks, not being public moneys received by the province, could only be withdrawn on the terms stated in the Act. The second Order of October 7 had approved the terms of the preliminary bond in a form which made the principal and interest payable in London at the counting-house of Messrs. Morgan, Grenfell & Co. The terms of the bond provided that it should be secured by a mortgage from the railway company to the Standard Trusts Company and for the guarantee of principal and interest by the province. The bond was to be registered in the books of the company in London, and transfers were to be made in these books.

Shortly after the making of the two Orders in Council of October 7 arrangements were made in London with Messrs. Morgan, Grenfell & Co. for the raising of the money authorized to be borrowed. To enable the transaction to be carried out, the railway company on October 28 entered into a formal contract with the provincial Government for the construction of at least 350 miles of the line. The contract recited the right of the company to issue bonds in proportion to mileage and terminals and the authority of the Government to guarantee principal and interest to the extent of \$20,000 a mile and further sums in respect of terminals, and provided, in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued should be paid into the banks approved by the Lieutenant-Governor in Council to the credit of the Treasurer of the province in a special account, and that such proceeds should from time to time be paid out to the railway company on engineers' certificates.

The balance of the proceeds after completion of the railway and terminals was to be paid over to the railway company.

By a deed of the same date made between the railway company, the provincial Government, and the Standard Trusts Company, a company incorporated under the law of Manitoba, and having its head office outside the province, the railway company mortgaged its property to the Trusts Company to secure the bonds for the sum of \$7,400,000 and interest at 5 per cent., repayable on January 1, 1959, and the Government guaranteed payment of principal and interest. The security expressly included not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on November 22, the railway company entered into a contract with the appellant construction company, which had been incorporated under Dominion statutes and had its head office outside the province, for the construction of the railway, and the railway company agreed to pay to the construction company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of March 8, 1910.

Under the arrangements with Messrs. Morgan, Grenfell & Co., the preliminary bond for \$7,400,000 already referred to was taken up by them. A letter of October 11, 1909, from the Deputy Provincial Treasurer of the province to Messrs. J. P. Morgan & Co., of New York, shews the method adopted by the Government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co. as agents for the Government. That firm was to transfer to or hold this bond for Messrs. Morgan, Grenfell & Co., the immediate takers up of the bond issue in London. The purchase-money was to be deposited to the credit of the Provincial Treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York the money which was to be applied and secured, in accordance with the statutes, Orders in Council, and contracts already referred to, was paid in instalments in New York, the part with which the appellant bank is concerned being received by

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its house in New York, and credited to the Provincial Treasurer to the railway special account. The bank had its head offices in Montreal and was incorporated under Dominion law. The account at Edmonton in Alberta was opened there in accordance with the arrangements already referred to. No money in specie was sent to the branch office which the bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account. It is plain that all these transactions were carried out for the purposes and on the faith of the statutes, Orders in Council, contracts, and mortgage deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the Government at this period meant the appellants to understand that it would adhere strictly to the terms of its guarantee.

The construction company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the bank made advances, and the construction company assigned to the bank as security its interest in the proceeds of the bond issue.

The second chapter of the history of the events which resulted in the appeal before their Lordships opened in March, 1910. There appears to have been public uneasiness about the action of the Government in entering into the arrangements above described, and, in the event, a Royal Commission of inquiry was appointed. While it was sitting there was a change of Government. The new Administration introduced and passed two statutes, and on the validity of the first of these the question to be decided in the appeal turns. This statute, which became law on December 16, 1910, after setting out in its preamble that the railway company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then

standing in the banks in the name of the Treasurer of the province or otherwise, and comprising, inter alia, the \$6,000,000 and accrued interest in the appellant bank, should form part of the general revenue fund of the province free from all claim of the railway company or their assigns, and should be paid over to the Treasurer without deduction. It was also provided that notwithstanding the form of the bonds and guarantee the province should as between itself and the railway company be primarily liable on the bonds and should indemnify the company against claims under them. By another statute passed at the same time any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to might submit a claim to the Government to be reported on to the Legislature.

On the day of the passing of these Acts a notice was served on behalf of the Treasurer of the province on the appellant bank claiming payment of \$6,042,830.26 and interest, and a cheque was presented to and refused by the bank. A claim against the bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was immediately launched, claiming, on behalf of the Crown and the Provincial Treasurer, the sum above mentioned from the appellant bank, and the railway company and the construction company were subsequently joined as defendants. The main defence pleaded was the invalidity of the first of the two statutes of 1910, and the bank also claimed a lien for advances to the construction company. The case was tried before Stuart J., who held that the proceeds of the bonds were within the province, and that the matter was one of a local nature in the province. He therefore decided that it fell within class 16 of s. 92 of the British North America Act, and not within s. 91, and that accordingly, the statute having been validly passed, there should be judgment for the plaintiffs. The appellants appealed to the Court of Appeal, which unanimously dismissed the appeal. The Chief Justice held that the statute was probably authorized by classes 10 and 16 of s. 92, and certainly by class 13, relating to property and civil rights. He also decided against the appellants on the further points they made that the Act trenchoned on the

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subject of banking legislation in s. 91, and that it was invalid as being confiscatory and not an authorized way of raising a provincial revenue. Beck J., Scott J., and Simmons J. decided against the appeal on substantially the same grounds, though the two latter learned judges differed from the rest of the Court on a minor question as to interest.

Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the Legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such as this it was in the power of that Legislature subsequently to repeal any Act which it had passed. If this were the only question which arose the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the judgments of the learned judges in the Courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett L.J. in *Wilson v. Church* (1), when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. *Wilson v. Church* (1), which was affirmed in the House of

(1) (1879) 13 Ch. D. 1, at p. 49.

Lords under the name of *National Bolivian Navigation Co. v. Wilson* (1), is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain Customs duties. The foreign Government, finding that the railway had not been made, revoked the concession. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations substantially carry out the scheme. It was held that while the Government had a right to revoke the concession, which could not be questioned, the effect of its so doing was materially to vary the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the Orders in Council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control. It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in

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London were entitled to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the Legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *Rex v. Lovitt* (1), where the point decided was in reality quite a different one.

In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910 infringed the provisions of s. 91 of the British North America Act, by attempting to deal with a question relating to banking, and by trenching on the field already occupied by the Dominion Banking Act. It was also contended that the appropriation of the deposits to the general revenue fund of the province was outside the powers assigned to the provincial Legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions and of other points which were made during the arguments of counsel.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the action dismissed. The respondents must pay the costs here and in the Courts below.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

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|---|--------------|----------------|
| FELIX A. McHUGH (SINCE DECEASED, BY HIS
REPRESENTATIVES) | } PLAINTIFF; | J. C.*
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| AND | | Dec. 3, 5, 9. |
| UNION BANK OF CANADA | DEFENDANT. | 1913 |
| THOMAS P. McHUGH (SINCE DECEASED) | PLAINTIFF; | Feb. 17. |
| AND | | |
| UNION BANK OF CANADA | DEFENDANT. | |

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

- . *Chattel Mortgages—Damages for Negligent Sales of Horses—North-West Provinces Consolidated Ordinances, 1898, c. 34, ss. 2, 3, and Schedule—Construction—Restriction upon Charges by Mortgagees—Penalty for Excess Charges permissive—Bank Act, 1906, s. 91—Stipulated Rate inoperative—Voluntary Payments at Unauthorized Rate irrecoverable.*

In suits by mortgagors for an account of what was due by them under chattel mortgages credit was claimed in respect of damages for the mortgagees' negligence in the realization of certain horses seized and sold by them, and also for a penalty being treble the amount of an alleged excess charge by the bank for expenses and commission on the sales thereof. The stipulated rate of interest was 8 per cent. per annum, the mortgagees admitted that they could not enforce a higher rate than 7 per cent., while the mortgagors contended that only 5 per cent. could be recovered:—

Held, that (1.) the findings of the trial judge as to the defendant's negligence in the sales and as to the consequent quantum of damages were not shewn to have been erroneous and therefore should not have been varied in appeal.

(2.) The limitation by North-West Provinces Consolidated Ordinances, 1898, s. 34, of a chattel mortgagee's charges in respect of seizures and sales related only to certain indispensable acts specified in the schedule thereto. The parties to the mortgage were left free to contract with reference to any other expenses of realization which might be shewn to be reasonable and necessary; and no ground had been shewn for imposing the penalty, which was permissive and not imperative, since the defendant's conduct had been reasonable and prudent.

(3.) Under Bank Act, 1906, s. 91, the stipulation for 8 per cent. interest was inoperative, and therefore, as no rate had been fixed by

* *Present*: VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD MOULTON.

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agreement, only the legal rate of 5 per cent. was recoverable. As regards past payments of interest at a rate not authorized by the Act the mortgagors were not entitled to recover back the excess which they had voluntarily paid.

CONSOLIDATED APPEALS by special leave from two judgments of the Supreme Court of Canada (May 15, 1911).

On May 28, 1907, and December 17, 1907, the plaintiffs who are represented by the appellants severally executed to the defendant bank chattel mortgages in similar terms for the amount of their indebtedness to the bank at those dates. They made default, and the bank seized a large number of mortgaged horses in exercise of the powers contained in the mortgage deeds, the relevant provisions of which are set out in their Lordships' judgment. Both plaintiffs claimed damages in respect of the sales having been effected at an undue depreciation, in the first case by reason of negligence in overdriving them to the markets and in the second of insufficient advertisement of sale. The right to recover was in both cases a question of evidence in respect of which the finding of the trial judge as to the amount of damages was eventually upheld by their Lordships.

The suits were brought in September, 1908, and March, 1909, by the mortgagors for an account of what was due by them under their mortgages, and two points of law were decided as arising under the circumstances detailed in their Lordships' judgment:

(a) Whether the respondent bank made charges for commission and other expenses in connection with the seizure and sale of the horses in question in excess of those allowed by the Consolidated Ordinances of the North-West Territories, 1898, c. 34, and, if so, whether the appellant is entitled under that Ordinance to treble the amount of such excess.

(b) What rate of interest was the respondent bank entitled to recover from the appellant having regard to s. 91 of the Bank Act, R. S. C., 1906, c. 29.

In reference to the rate of interest the Interest Act, R. S. C., 1906, c. 120, s. 3, is material, for it provides that where no rate of interest is fixed by the agreement of parties or by law the rate shall be 5 per cent. per annum.

The trial judge held that the bank was not entitled to charge for the expenses of the sale more than the amount allowed in the schedule to the said Ordinance, and intimated that in his opinion the bank was chargeable with treble the amount which it had charged contrary to the Ordinance. He also held that the bank could only recover 5 per cent. interest under the Interest Act, R. S. C., 1906, c. 120, s. 3.

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The Supreme Court of Alberta directed in the first case that in the taking of the account the bank was entitled to annual interest at the rate of 7 per cent. up to the date of the first mortgage, December 31, 1904, at 8 per cent. from December 31, 1904, to the date of the second mortgage, May 28, 1907, and thereafter at 7 per cent., but that the account should not be opened further back than six years from the date of the writ. It also ordered that the appellant should recover treble the amount of the costs demanded in excess of the amount allowed by the Ordinance.

The Supreme Court of Canada (1) held (Idington J. dissenting) that the rate of interest stipulated for should be reduced to 7 per cent. It unanimously held that the appellant had by the terms of the power of sale in the chattel mortgages waived or excluded the provisions of the Ordinance. It relied upon *Robson v. Biggar* (2), in which it was held that an expressed consent to a bailiff charging 5 per cent. over and above the statutory costs excluded the provisions of the Distress Costs Act, 1817 (57 Geo. 3, c. 93).

Atkin, K.C., Geoffrey Lawrence, and C. B. Reilly, for the appellants, contended that upon the true construction of s. 2 of the North-West Territories Ordinance respecting distress for rent and extra-judicial seizure it limits and was intended to limit the expenses with which a mortgagee can charge his mortgagor. The bank in this case making a seizure under a chattel mortgage was not entitled to deduct from the proceeds of the goods sold any costs other than those authorized by the schedule to that Ordinance. The section was passed for the protection of mortgagors against mortgagees, and it is contrary to the policy of

(1) See 44 Sup. Can. Rep. 473.

(2) [1907] 1 K. B. 690.

J. C. enactments of that class to permit the persons intended to be protected to contract themselves out of the Act. There is moreover
 1912 nothing in the chattel mortgages in this case which purports or
 McHUGH is effectual to waive the benefit or exclude the operation of s. 2.
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 UNION BANK OF CANADA. The evidence on the other hand shews that the bank in breach thereof made charges largely in excess of those authorized by the schedule, and it is therefore liable to the penalty prescribed by s. 3. The infliction of the penalty was imperative, but if discretionary with the Court it was contended that the circumstances justified its imposition and rendered it obligatory. Reference was made to *Julius v. Bishop of Oxford* (1); *Macdougall v. Paterson* (2); *In re Eyre and Corporation of Leicester*. (3) As to the operation of the Ordinance being excluded by the terms of the mortgage deed, see *Robson v. Biggar*. (4)

As regards the view expressed in Anglin J.'s judgment that the Ordinance did not apply to a mortgagee who sold through a bailiff it was submitted that the Ordinance must be construed by reference to its own terms and that no argument can be founded or inference drawn as to its correct interpretation from a consideration of the British Act 57 Geo. 3, c. 93. It was further contended that the stipulation contained in the mortgages for annual interest at 8 per cent. was ultra vires and void. See Bank Act, R. S. C., 1906, c. 29, s. 91, which limits the rate to 7 per cent., and Interest Act, R. S. C., 1906, c. 120, s. 3, which prescribes 5 per cent. where no rate is fixed by agreement or law.

J. S. Ewart, K.C., Buckmaster, K.C., and Hamar Greenwood, for the respondent bank, contended, with regard to the rate of interest stipulated in the mortgage, that it was not the effect of s. 91 of R. S. C., 1906, c. 29, to render the stipulation nugatory and void, but that its effect was to render it unenforceable so far as it exceeded the authorized rate of 7 per cent. With regard to the appellants' contention in the Courts below that the bank could not recover any interest at all in consequence of such stipulation it was submitted that that was unreasonable, and also, as they had not appealed from the decision of the trial judge in favour of 5 per cent., they were precluded

(1) (1880) 5 App. Cas. 214, 225.

(3) [1892] 1 Q. B. 136.

(2) (1851) 11 C. B. 755.

(4) [1907] 1 K. B. 690.

from raising the point. Reference was made to *Daniell v. Sinclair*. (1) As regards damages and the amount thereof they contended that the evidence did not justify the amount awarded. It was purely guesswork, and it was not shewn what was the correct basis on which they should be calculated, what was the extent of depreciation, if any, of the horses, and how it was caused. With regard to the Ordinance of 1898, c. 34, it was contended that it did not apply to this case, since the mortgage deed provided the charges which the bank was authorized to make. There are no provisions in the Ordinance which prohibit agreements for charges not therein specified. The mortgage deeds expressly authorize charges not specified in the Ordinance. There was nothing illegal or improper in the charges so authorized, and they related to circumstances to which the Ordinance did not apply and for which it did not provide. There was no question of waiver of the terms of the Ordinance. The provisions of the mortgage deed were supplementary and dealt with matters outside the scope of the Ordinance. There was no evidence that the bank had made any charges which were excessive or improper; and the Ordinance merely prescribed a tariff of charges on specific points to which alone it related. Even if the charges were contrary to the Ordinance it does not imperatively require the infliction of the penalty, but is permissive and ought not to have been applied to this case.

Atkin, K.C., in reply.

The judgment of their Lordships was delivered by

LORD MOULTON. These are consolidated appeals in two cases in which Felix A. McHugh and Thomas P. McHugh were respectively the plaintiffs and the Union Bank of Canada was the defendant. They are brought by special leave from judgments of the Supreme Court of Canada in the two cases dated May 15, 1911. The original plaintiffs, Felix A. McHugh and Thomas P. McHugh, have died during the pendency of the actions, and the present appellants are in each case the personal representatives of the original plaintiffs.

The appeals were directed to be heard together. The points

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J. C. raised in them are substantially the same with the exception of
1913 the point as to amount of damages, which turns upon the facts
MCHUGH in the two cases which, though similar, are not identical. For
v. the purposes of their Lordships' judgment it will be convenient,
UNION BANK however, to deal with the actions separately, taking first the
OF CANADA. action of *Felix A. McHugh v. The Union Bank of Canada*. The
decision in that case will necessarily govern the decision in the
case of *Thomas P. McHugh v. The Union Bank of Canada*, with
the exception of the question as to damages which will be dealt
with separately.

The action of *Felix A. McHugh v. The Union Bank of Canada* arose out of the following circumstances. Felix A. McHugh was a rancher carrying on business in the Province of Alberta with his brother Joseph McHugh, under the name of McHugh Brothers. On December 31, 1904, this firm executed a chattel mortgage to the Union Bank of Canada on a number of horses and other chattels to secure a principal sum of \$24,000, with interest at the rate of 8 per cent. per annum, with rests every three months. This chattel mortgage was held by the bank as collateral security for its advances to the firm, and continued so to be held until May 28, 1907, when the firm executed another chattel mortgage to the bank on the same terms on certain horses and other chattels, to secure a principal sum of \$36,223, in substitution for the former mortgage. This sum represented the admitted indebtedness of the firm to the bank at the date on which it was executed, and was intended to be treated as collateral security for the advances to the firm in the same way as the mortgage of December 31, 1904, had been treated.

Subsequently to the making of the last-mentioned mortgage, and prior to any of the events hereinafter referred to, Felix A. McHugh acquired the partnership business and assumed the liability to the bank. Early in July, 1908, Felix A. McHugh was in default under the chattel mortgage, and accordingly the bank, by a certain authority dated July 6, 1908, directed Alden B. Smith to seize the mortgaged horses under the mortgage, and such seizure was thereupon made by him on behalf of the bank. The horses in question were at the time of the seizure upon Felix A. McHugh's ranch, situated about fifty-five miles from

Calgary. Some of the horses on the ranch were suffering from mange, and therefore the whole of the horses were in quarantine, and according to the regulations prevailing in the province at the time no horses could be removed from the ranch either for the purpose of sale or otherwise until after they had been dipped in a bath of sulphur and lime. Accordingly the bank caused the horses to be so dipped, and, after all the quarantine regulations had been duly complied with, had them driven to Calgary in two or three lots. It is not necessary to go into the detail of the collection and treatment of the horses on the ranch, or of the way in which they were driven into Calgary for sale, excepting to say that the plaintiff complained that they were driven too hurriedly and that by reason thereof some of them died and others were put out of condition, and it is in respect of these that the claim for damages is made. It is, however, admitted that it was proper for the bank so to collect, treat, and send to Calgary these horses in order to effect a proper realization of the mortgaged chattels. The only other alternative would have been to sell them to some buyer who would have been content to take them at the ranch under quarantine, and it is obvious that such a proceeding would have involved ruinous loss to the plaintiff, who was interested in their fetching as high a price as possible, seeing that he was entitled to have the amount realized by the sale put to his credit in reduction of the amount due by him to the bank.

The horses were sold by public auction by the Alberta Stock Yards Company, Limited, at their stock yards at Calgary at various dates ranging from August 14 to September 3, 1908. No suggestion is made in the evidence that this was not a proper and prudent mode of conducting the sale, nor was any objection made to it at the time or subsequently. Indeed, from the evidence their Lordships would conclude that it was practically essential thus to sell the horses at the stock yards at Calgary in order to get the benefit of a market. The charges of the Alberta Stock Yards Company, Limited, for conducting the sale were their usual and customary charges, namely, expenses and $3\frac{1}{2}$ per cent. commission, this commission including the necessary advertising. The company also according to their practice wrote

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J. C. round to such customers as they thought likely to become
1913 customers, giving them special notice of the proposed sales, and
McHUGH no complaint is made in this action of any lack of diligence on
v. their part or on the part of the bank in advertising and otherwise
UNION BANK making known such sales. The accounts of the Alberta Stock
OF CANADA. Yards Company, Limited, in respect of such sales are set out in
a letter from the company to the assistant manager of the bank,
dated September 9, 1908.

The present action was commenced in the month of September, 1908, the statement of claim being delivered on September 11. In substance the relief claimed was threefold :—

1. A taking of accounts between the plaintiff and the defendant bank under the mortgages.

2. Damages to the amount of \$8000 for the defendant's negligence and want of care and skill in connection with the realization of the horses.

3. Upon an allegation that the defendant bank had charged for expenses and commission on the sales a larger sum than that which could be properly charged under the provisions of the Ordinance respecting distress for rent and extra-judicial seizure, a claim is made for the sum of \$2232.12, being treble the amount of the alleged excess.

At the trial an application was made to amend the statement of claim by adding an allegation to the effect that the rate of interest provided to be paid by the said mortgage was illegal and in excess of the rate which the bank was entitled to stipulate for, take, reserve, exact, receive, or recover under the Bank Act. The learned judge did not allow the amendment, taking the view that the plaintiff was estopped on the point so far as related to matters previous to the mortgage of May 28, 1907, and that the question of the rate of interest to be charged under the later mortgage would probably be raised on taking the accounts. But although the amendment was not formally allowed, the effect of the judge's action and that of the judges in the Superior Courts has been to make the question as to the proper rate of interest a question to be decided by their Lordships as well as the question of the extent to which past payments and statements of account are to be affected by their decision.

The questions thus raised between the parties are so distinct and so diversified in their nature that it will conduce to clearness if they are taken separately both in dealing with the history of the litigation and in deciding the questions raised.

Accounts.—The learned judge at the trial, by a judgment dated July 12, 1909, directed the bank to file its account beginning at May 28, 1907, the date of the latter mortgage. But inasmuch as the plaintiff had shewn that certain arithmetical errors had been made in the calculation of interest in the accounts between the plaintiff or his firm and the defendant bank prior to May 28, 1907, which affected the amount due to the defendant bank on that day, he gave leave to the plaintiff to surcharge and falsify such accounts in respect of those arithmetical errors and not otherwise so as to correct the calculation of the amount due to the defendant bank on May 28, 1907, it being admitted that it was the intention of the parties that the sum therein named should be the sum actually due to the defendant bank at that date. In the accounts to be taken under the said mortgage, he directed that the amount so corrected should be taken to be the principal sum secured by the mortgage of that date, and should bear interest according to the terms of the said mortgage, i.e., at 8 per cent., but that it should be open to the plaintiff to contend on taking the accounts that the interest should be calculated at the rate of 5 per cent. and not more. On the appeal from the judgment of Beck J. to the Supreme Court of Alberta that Court varied these directions by substituting a direction that in taking the accounts between the plaintiff and the defendant bank up to December 31, 1904, the date of the first mortgage, the plaintiff should not be charged with a higher rate of interest than 7 per cent. per annum. From December 31, 1904, to May 28, 1907, they permitted the interest to be charged at 8 per cent. per annum—in this respect agreeing with the judgment of Beck J.—but they directed that subsequent interest should be taken at the rate of 7 per cent. per annum. They also directed that no accounts should be opened or inquired into for any period prior to six years previous to the date of the writ in the action.

The judgment of the Supreme Court of Alberta was unanimous and was delivered by Scott J. The reason that he gives for fixing

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J. C. 7 per cent. is that it is the highest rate per cent. which by the
1913 Bank Act the defendant bank is entitled to charge. He also
considered that he was entitled to find that prior to the first
McHUGH mortgage the plaintiff was not aware that he was paying an
v. UNION BANK excessive rate, but that from and after signing that mortgage
OF CANADA. promising definitely to pay 8 per cent. the payments were
voluntary and could not be recovered back.

An appeal and a cross-appeal were brought from this decision to the Supreme Court of Canada, and these directions as to accounts were affirmed so far as the method of taking them is concerned. Idington J. appears to have dissented from the judgment of the rest of the Court on this point.

Reserving for consideration later the question of the proper rate of interest to be allowed, their Lordships are of opinion that the mortgage of May 28, 1907, was intended to be a settlement of accounts between the parties, and that no case had been made out by the plaintiff for disturbing the accounts so settled otherwise than that he should have liberty to surcharge and falsify previous accounts with regard to arithmetical errors. In this respect, therefore, their Lordships agree with the judgment of Beck J. at the trial.

Damages.—At the trial Beck J. considered all the evidence and came to the conclusion that there was negligence in connection with bringing some 360 of the horses to Calgary considering their condition, the time of the year, and the road over which they were driven. He was of opinion that they should not have been driven so soon after they had been dipped, nor in so large a band, &c., and he assessed the damages at \$2800. On appeal to the Supreme Court of Alberta that Court set aside that assessment on the ground that it was unable to discover any method by which such an amount could properly be arrived at upon the evidence, but it granted to the plaintiff the option to have it referred to the clerk of the Court at Calgary to take an account of what damage, if any, the plaintiff had suffered by the negligence of the defendants, but limiting such damages to the difference between the sums of money received by the defendants from the sale of the horses and what was a fair and full value of the horses as they stood before they were seized or handled at

all while in the plaintiff's possession at his ranch, still ungathered and still in quarantine.

From this decision the plaintiff appealed to the Supreme Court of Canada. On such appeal the order directing a reference at the plaintiff's option was affirmed by a majority of the Court, but the direction as to the mode of assessing damages of such reference was varied, the Court declaring that the measure of damages to be allowed should be the depreciation in value if any of the plaintiff's horses caused by the manner in which they were driven from the plaintiff's ranch to the place at which they were sold. Duff and Anglin JJ., who constituted the minority of the Court, were of opinion that the judgment of the judge at the trial for \$2800 in respect of damages should be restored.

Their Lordships are of opinion that the assessment of damages by the learned judge at the trial should stand. There was evidence on which the learned judge could come to the conclusion that by the negligent behaviour of the defendants' agent the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

Penalties.—Before dealing with the decision of the Courts upon this point it is necessary to explain in greater detail the nature of the claim under this head.

The claim is based upon the provisions of the North-West Provinces Consolidated Ordinances, 1898, c. 34. By this Ordinance statutory limits are prescribed for costs and charges

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in respect of seizures in chattel mortgages, bills of sale, or any other extra-judicial process whatsoever. This is done by means of a schedule to the Ordinance setting out the charges for certain specific acts in connection with such seizures, namely, (1.) levying the distress; (2.) the man in possession; (3.) appraisement; (4.) advertising; (5.) catalogue, sale, commission, and delivery. By the third section it is enacted that if greater or other costs be taken by the person making the distress the party aggrieved may summon him before the Supreme Court of the judicial district where the seizure is made, and that Court may order him to pay to the party aggrieved treble the amount of moneys taken in excess and costs of suit.

The contention of the plaintiff is that the schedule is inclusive, and that in return for the costs and charges specified in the schedule the party making the seizure must bear all costs connected with it, whether for the matters named in the schedule or otherwise, and further that it is impossible contractually to exclude the operation of the statute, so that whatever be the provisions of the chattel mortgage with regard to the rights of the mortgagee to be reimbursed necessary expenses in the realization of the mortgaged property in case of default, he can under no circumstances receive more than the sums set out in the schedule of the Ordinance. The plaintiff also contends that if he does take or receive anything in excess of the scheduled sums the Court has no option but to inflict upon him the payment of treble the excess by way of penalty.

The defendants, on the other hand, contend that the statute deals only with the costs of certain matters which are, so to say, the ordinary and almost universal features of realization by seizure and sale, namely, seizure, possession, appraisement, advertisement, and sale, but that it does not refer to the costs of other acts which may be necessary and proper for the right realization of the property seized and which as between the mortgagor and the mortgagee would on well-recognized principles of equity be regarded as costs of realization which would be a first charge on the sums realized by the sale. They further contend that it is open to parties to insert provisions in the mortgage deed entitling the mortgagee to other and different costs, and that

such provisions are valid between the parties notwithstanding the Ordinance. And finally they contend that the infliction of the penalty is permissive only and not obligatory, and that if in the present case the Ordinance applies and there has been an infraction of it, the circumstances are such that the Court ought not to impose the penalties.

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The judge at the trial appears to have adopted the plaintiff's contention that the schedule was inclusive, but he declined to impose the penalties for a reason which is now admitted to have been based on a mistake of fact and therefore need not be examined. On appeal to the Supreme Court of Alberta the Court affirmed his judgment as to the schedule being inclusive, and further found in favour of the plaintiff with regard to the penalties. They held that it was obligatory on the Court to inflict the penalties where any excess above the schedule had been charged, and referred it to the clerk of the Court of Calgary to ascertain the excess and to tax the costs "allowable under a schedule to the said Ordinance upon which the plaintiff may move before a judge for judgment for treble the excess shewn to have been taken"—language which it is difficult, if not impossible, to construe, and which leads their Lordships to the conclusion that there must be some misprint in the record.

On appeal to the Supreme Court of Canada the judgment on this point was not affirmed, the Court being unanimously of opinion that the defendant bank ought to be allowed its reasonable and necessary costs for care, maintenance, and removal of the horses seized by it under its said chattel mortgage. Inasmuch as there was no evidence or even contention that if this was the legal position of the defendant bank it had taken or received more than it was entitled to, the Court did not deal with the question as to whether the imposition of penalties by the Court was permissive or obligatory.

Their Lordships agree with the judgment of the Supreme Court of Canada on this point. It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

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But such a doctrine recognizes as a necessary corollary the right of the mortgagee to treat the reasonable expenses of such realization as a deduction from the amount realized, and indeed, unless this is done, the sale price does not truly represent the value of the property sold, because it is a sum which the owner could not have obtained for it without paying the necessary costs of realization. In the case of chattel mortgages it may frequently happen that some of the goods may not at the moment of seizure be in a condition which permits of immediate sale, or, in other words, that no reasonable man would attempt to sell them without previous preparation if they were his own. For example, the goods may be in process of manufacture, and may be so unfinished that they would be incapable of being transported without deterioration unless some further operation was performed upon them, or they might require to be baled before they could be put into the market, or they might require to be sent a substantial distance by rail to some place proper for the sale of such goods. Other possibilities of a like kind will readily suggest themselves. But for this purpose it is not necessary to travel beyond the circumstances of the present case. No better instance could be found than that which we have here. The horses were in quarantine on a ranch situated at a considerable distance from any market. They had therefore to be dipped and then kept for a time, and then taken a considerable distance before they could reach a market. During all this time they must be fed and tended. All this is admitted by the plaintiff, his only complaint being that they were not kept for a longer time, and in reality he is claiming in this action damages because the defendant did not perform these duties more thoroughly, and in a manner involving greater outlay. But all these operations cost money, and it is common ground that it is only by going to this cost that any realization of the mortgaged property which is fair to its original owner can be obtained. Yet the contention of the plaintiff is that although as a mortgagor he is entitled to require that the mortgagee shall incur all these costs in order to increase the amount which the chattels will bring on sale, these costs are not to be a deduction from the sale price, but must come out of the pocket of the

mortgagee, and that it is actually illegal even to provide that it shall be otherwise.

In the present case the relevant provisions of the mortgage deed are as follows: "And upon and from and after taking possession of such goods and chattels it shall and may be lawful, and the mortgagee, and each or any of them, is and are hereby authorised and empowered at his or their discretion, to sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale on the premises hereinbefore described or elsewhere as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse all such sums and sum of money as may then be due by virtue of these presents, and all costs and expenses (including the costs (if any) of the solicitor of the mortgagee) as may have been incurred by the mortgagee, in consequence of the default, neglect, or failure of the mortgagors in payment of the said sum of money with interest thereon as above mentioned, or in consequence of such sale or removal as above mentioned, or in consequence of failing in the performance of any of the covenants or agreements herein contained, and on the mortgagors' part to be performed and kept, and in the next place to pay unto the mortgagors all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure and after payment of the costs, charges, and expenses incurred by such seizure and sale as aforesaid." There is nothing unreasonable in these provisions which probably add but little to what the law would imply in any case of sale by a mortgagee under a power of sale. Yet, if the contention of the plaintiff on this point be correct, all such provisions are made inoperative and illegal by the Ordinance.

It would require clear language to lead their Lordships to hold that it is the object and effect of any statute to render it impossible for the parties to a chattel mortgage to provide that the mortgagee in realizing the mortgaged property in case of default shall be allowed the fair and necessary cost of so doing. On examining the language of the Ordinance their Lordships can find nothing which when reasonably construed points to anything

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of the kind. Taken in connection with the schedule, the only effect of s. 2 of the Ordinance is, in their Lordships' opinion, to fix a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale. For such acts it limits the charges, or rather statutorily ascertains them. But it does not deal in any way with other expenses of realization which are reasonable and necessary in the interest of both parties, and therefore in respect of such charges the ordinary rules of law prevail and the parties are free to contract, and must be held to the bargain they have made.

This being their Lordships' interpretation of s. 2 of the Ordinance, it may well be that no question will arise under the penalty clause when the accounts are taken. But it may also happen that some case of an excess charge with regard to a schedule item may be found, and therefore it is necessary to consider the question whether the infliction of the penalties in such a case is obligatory or permissive. In deciding this question the dominating consideration is that the Ordinance, which is chapter 34 of the Consolidated Ordinances of the North-West Territories of Canada passed in the year 1898, is subject to the Interpretation Ordinance, which is chapter 1 of the same year, and must be interpreted accordingly. By s. 8, sub-s. 2, of the Interpretation Ordinance it is expressly provided that the expression "shall" shall be construed as imperative, and the expression "may" as permissive. It is true that (as is customary in interpretation clauses) these sub-sections are prefaced by the words "unless the context otherwise requires," but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may." The Court is bound to assume that the Legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may." The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which

leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the Legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their Lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.

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This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must." In the light of those decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

Should any case of excess be found to have occurred, their Lordships are of opinion that in view of all the circumstances, and especially of the fact that the conduct of the defendant bank in the course they pursued was reasonable and calculated to obtain the best price for the chattels sold, there is no ground for imposing the penalty.

Interest.—The contention of the plaintiff with regard to the interest chargeable to the bank is that it is ultra vires on the part of the bank to charge a higher rate than 7 per cent. and that their stipulation in the mortgage of May 28, 1907, that interest shall be charged at the rate of 8 per cent. was ultra vires and void. But he does not contend that the bank is entitled to no interest, but admits that it is entitled to 5 per cent., which is the legal rate of interest where no special rate of interest is fixed. The defendants admit that they cannot recover interest at a higher rate than 7 per cent., but claim that they are entitled to recover interest at that rate.

The statutory provisions applicable to the case are to be found in the Bank Act, 1906, which enacts, in s. 91, as follows: "The bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per centum per annum, and may receive and take in advance any such

J. C. rate, but no higher rate of interest shall be recoverable by the
1913 bank."

McHUGH v. UNION BANK OF CANADA. Their Lordships are of opinion that the express provisions of the first portion of this clause rendered it ultra vires on the part of the bank to insert in the chattel mortgage of May 28, 1907, the stipulation that interest should be payable at the rate of 8 per cent., and that therefore that stipulation is inoperative. They are of opinion, therefore, that the contention on behalf of the plaintiff in this respect is right, and that the interest under that mortgage must be calculated at the rate of 5 per cent. per annum.

It was further sought by the plaintiff to apply this principle to the earlier mortgage, and to the various bills or notes of hand which preceded it, but in their Lordships' opinion the mortgage of May 28, 1907, amounted to a settlement of accounts between the parties, having the same effect as payment would have had with regard to the question as to the interest charged between the parties. The plaintiff must be taken to have known that the bank had no right to stipulate for and no power to recover interest at 8 per cent., but he voluntarily assented to that, which was equivalent to payment of interest at that rate, and he has no right to recover back any excess which he thus voluntarily paid.

Inasmuch as their Lordships are of opinion that the plaintiff should only be allowed to surcharge and falsify in respect of arithmetical mistakes in the calculation of interest in accounts prior to May 28, 1907, their Lordships do not think that in so doing he should be limited to a period of six years before the beginning of the action. The Statute of Limitations was not pleaded, and such mistakes are of a character which common honesty would desire should be rectified whenever they are discovered.

THOMAS P. McHUGH v. THE UNION BANK OF CANADA.

In this case the plaintiff executed a chattel mortgage on December 17, 1907, for an amount which, as in the previous case, represented the indebtedness of the plaintiff to the defendant bank at that date. He made default at or about the same

time as Felix A. McHugh, and there was a seizure and sale by the defendant bank. But in this case the complaint against the defendant bank with regard to the sale of the horses is not that there was any negligence in overdriving them, &c., but that the sales were not sufficiently advertised. Beck J. at the trial considered this contention established and awarded damages to the amount of \$2175. On appeal, however, to the Supreme Court of Alberta this part of his judgment was reversed, and the action, so far as it relates to damages for an improvident sale, was dismissed. The Supreme Court of Canada agreed with the judgment of the Supreme Court of Alberta in this respect, and their Lordships see no reason to doubt that they were right in so doing.

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Their Lordships will therefore humbly advise His Majesty as follows:—

1. That as regards the appeal of the said Felix A. McHugh, (since deceased), the same ought to be allowed in part, that the judgment of the Supreme Court of Canada, dated May 15, 1911, and the judgment of the Supreme Court of Alberta en banc, dated June 24, 1910, ought to be respectively set aside, and that the judgment of the Supreme Court of Alberta, dated July 12, 1909, ought to be restored, subject to the following variations:—

(1.) That the directions as to taking accounts under (a) of the said judgment shall be varied by directing that the interest on the sum secured by the mortgage of May 28, 1907, shall be taken at the rate of 5 per centum per annum, instead of as in the said judgment directed.

(2.) That the directions for taking accounts under (b) of the said judgment shall be varied by adding thereto the words “so far as such costs, commission, and charges are in respect of matters to which the schedule to the said Ordinance relates.”

(3.) That a declaration should be inserted in the said judgment to the effect that the defendants are not liable to pay to the plaintiff any penalties under the provisions of the said Ordinance in respect of the matters to which the suit relates.

(4.) That it ought to be further declared that the sum of \$2800 damages is to be set off against such sum as may be

J. C. found due from the appellants to the respondents on taking the
1913 accounts referred to.

McHUGH And that the respondents should pay to the appellants all
v. their costs in the Courts below, and that there should be no
UNION BANK costs of the appeal to this Board.
OF CANADA.

2. That as regards the appeal of the said Thomas P. McHugh (since deceased), the same ought to be allowed in part, that the judgment of the Supreme Court of Canada, dated May 15, 1911, and the judgment of the Supreme Court of Alberta en banc, dated June 24, 1910, ought to be respectively set aside and that the judgment of the Supreme Court of Alberta, dated July 13, 1909, ought to be restored, except so far as it relates to the award of \$2175 damages, as to which the said judgment of the Supreme Court of Canada ought to be affirmed, and subject (mutatis mutandis) to the variations set out in the first paragraph of this report, and that the respondents should pay to the appellants all their costs incurred in the Courts below, other than the costs of the proceedings before Beck J. relating to the claim for damages, and that the appellants should pay to the respondents their costs of such proceedings, and that there should be no costs of the appeal to this Board.

Solicitors for appellants: *Withers, Bensons, Birkett & Davies.*

Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

JOHN H. KILMER DEFENDANT ;

AND

BRITISH COLUMBIA ORCHARD LANDS, }
LIMITED } PLAINTIFFS.ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
COLUMBIA.

J. C.*

1912

Dec. 6.

1913

Feb. 26.

Relief against Forfeiture—Default in Payment of an Instalment of Purchase-money—Time of the Essence of the Contract—Specific Performance decreed.

An agreement for sale by the respondent company of lands in British Columbia for a price to be paid in instalments at specified dates contained a clause of forfeiture both of the agreement and of all payments of past instalments of purchase-money in case of default of punctual payment of any one instalment; and time was declared to be of the essence of the agreement. Default having been made, the company sued to enforce the forfeiture; the appellant paid into Court the instalment due and counterclaimed for specific performance:—

Held, that by the law of British Columbia as well as by English law the condition of forfeiture was in the nature of a penalty from which the appellant was entitled to be relieved on payment of the purchase-money due.

APPEAL from a judgment of the Court of Appeal (April 2, 1912) reversing by a majority a judgment of the Supreme Court (September 14, 1911).

The respondent company, under the circumstances stated in their Lordships' judgment of default by the appellant in payment of an instalment of purchase-money, sued on August 1, 1910, for a declaration that their agreement of sale to the appellant of the lands in suit, dated December 14, 1909, was null and void. The appellant counterclaimed for specific performance and when the case came on for trial obtained leave to pay into Court the amount due to the company.

The trial judge dismissed the action and decreed specific performance on the counter-claim, relieving the appellant from any

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, and LORD MOULTON.

J. C. forfeiture or penalties incurred, on the authority of *In re Dagen-*
 1912 *ham (Thames) Dock Co., Ex parte Hulse* (1) and *Cornwall v.*
Henson. (2)

KILMER
 v.
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 COLUMBIA
 ORCHARD
 LANDS,
 LIMITED.

The Court of Appeal (Macdonald C.J. and Irving J.A.,
 Galliher J.A. dissenting) declared the agreement null and void.
 They held that the respondents were entitled to avail themselves
 of the express provision in the agreement making time the
 essence of the bargain, and that there was no ground on which
 the Court could grant relief against the forfeiture.

Buckmaster, K.C., and *Walter Burt*, for the appellant, contended
 that the forfeiture clause in the agreement for sale was in the
 nature of a penalty and that relief ought to be granted against
 its enforcement. The circumstances rendered its enforcement
 inequitable, for the appellant had been in possession of the lands
 bought and had spent various sums of money in their improve-
 ment with the knowledge and consent of the respondents. In
 any event he should be held entitled to a lien for the moneys so
 spent. Even if the forfeiture clause was intended to be operative
 according to the letter it was too late for the respondents to rely
 upon it and try to enforce it, for they had already negotiated one
 extension of the time of payment and agreed to it, thereby leading
 the appellant to believe that their strict rights would not be
 enforced. As they had submitted to postpone the day of enforcing
 payment they were no longer entitled to say that time was of
 the essence of the contract. The rigid date having been altered
 they were not entitled to say that the substituted date was rigid
 to the extent of being unalterable. Reference was made to *In*
re Dagenham (Thames) Dock Co., Ex parte Hulse (1), *Cornwall v.*
Henson (2), and *Barclay v. Messenger*. (3)

[LORD MACNAGHTEN referred to *Clydebank Engineering Co. v.*
Don Jose Ramos Yzquierdo y Castaneda. (4)]

See *Hughes v. Metropolitan Ry. Co.* (5), *La Belle v. O'Connor* (6),
 and *In re a Debtor*. (7)

(1) (1873) L. R. 8 Ch. 1022.

(4) [1905] A. C. 6.

(2) [1900] 2 Ch. 298.

(5) (1877) 2 App. Cas. 439.

(3) (1874) 43 L. J. (Ch.) 449.

(6) (1908) 15 Ont. L. R. 519, 546.

(7) [1908] 1 K. B. 344.

E. P. Davis, K.C., and *Malcolm Macnaghten*, for the respondents, contended that the Court of Appeal was right in enforcing the stipulated forfeiture and that no grounds for relief had been established by the appellant. The transaction was of a purely speculative character and it was expressly stipulated that time should be of the essence of the contract. It was contended that the principle on which the Court will grant relief was rightly laid down by Lord Cairns in *Tilley v. Thomas*. (1) Where it is stipulated that time should not be of the essence of the contract, that means that there is nothing in the express stipulations or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. Here there was an express agreement that time and punctuality of payment were of the essence of the contract, and it was contended reasonably so having regard to surrounding circumstances. Reference was also made to *Peachy v. Duke of Somerset*. (2)

Buckmaster, K.C., in reply.

The judgment of their Lordships, prepared by the late Lord Macnaghten, was delivered by

LORD MOULTON. The question on this appeal arises out of a claim by the respondent company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement the purchase-money was to be paid together with interest by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void, all payments made under the agreement were to be absolutely forfeited to the vendor, and the vendor was to be at liberty to resell the property immediately. The appellant Kilmer, who was the purchaser, and who had been let into possession upon payment of the first instalment on the execution of the agreement, met the company's claim by a counter-claim

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(1) (1867) L. R. 3 Ch. 61, 67.

(2) (1724) 1 Str. 447 (a); 2 White & Tudor, 8th ed., p. 255.

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for specific performance, and the money then due was paid into Court to the credit of the action. The trial judge dismissed the action. On the counter-claim he decided in favour of Kilmer with costs. Then there was an appeal. The Court of Appeal, consisting of three judges, by a majority allowed the appeal and dismissed the counter-claim. Hence this appeal.

The trial judge rested his decision mainly on the view that the conduct of the plaintiff company was oppressive, harsh, and vindictive, and such as to lull the defendant to sleep and justify him in assuming that he would, notwithstanding the terms of the contract, have some indulgence in making his payments.

Their Lordships agree to the result at which the learned trial judge arrived, though not exactly upon the same grounds.

In the case of *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (1), Mellish L.J. expresses himself as follows: "I have always understood that where there is a stipulation that if on a certain day an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." That was a case like this of forfeiture claimed under the letter of agreement and a cross action for specific performance. James L.J. seems to have been of the same opinion. "In my opinion," he says, "this is an extremely clear case of a mere penalty for non-payment of the purchase-money." He ends by stating that he agreed with the Master of the Rolls that it was a penalty from which the company were entitled to be relieved on payment of the residue of the purchase-money with interest. No doubt, the learned Lord Justice referred in detail to the special circumstances of the case, but it appears to their Lordships that that reference was made in answer to the arguments which had been addressed to the Court on behalf of the appellants. As regards the ground of his decision the two Lords Justices seem to have been in perfect accord.

The question raised by the present appeal appears to their Lordships to come within the decision in the case of the Dagenham

(1) L. R. 8 Ch. 1022.

Docks. The law in British Columbia on such a point must be the same as the law in this country.

The facts of the present case, so far as they are material to the decision, are as follows : By an agreement dated December 14, 1909, the respondent company agreed to sell to the appellant Kilmer, and Kilmer agreed to purchase, certain lands therein described for the sum of \$75,000, payable in manner and on the days and times thereafter mentioned, that was to say, \$2000 on the execution of these presents, a further sum of \$5000 on or before June 14, 1910, a further sum of \$5000 on or before December 14, 1910, a further sum of \$60,000 in six equal semi-annual instalments of \$10,000 each, on or before the 14th days of June and December in the years 1911, 1912, and 1913, and the balance of \$3000 on or before June 14, 1914, together with interest on so much of the said purchase-moneys as may from time to time remain unpaid at the rate of 7 per cent. per annum, and as well after as before maturity at the same rate, payable with each said instalment of purchase-money as aforesaid. Then followed an agreement on the part of Kilmer to pay the said sum of \$75,000, together with the interest thereon at the rate of 7 per cent. per annum, on the days and times and in the manner above mentioned, and to pay and discharge all taxes, rates, and local improvement assessments wherewith the said land might be rated and charged, and to take all necessary steps to procure a supply of water for irrigating the said lands, and to defray all the expenses of managing the said lands as from the date of the agreement, and all costs of surveying and subdividing the said lands. Then came the following agreements and declarations, namely :—

The usual statutory covenants.

“And the party of the first part further agrees with the party of the second part, his heirs and assigns to sign any plan or plans of sub-division of said lands or any part thereof prepared for or on behalf of the party of the second part, and in the event of a sale or sales by the said party of the second part, his heirs or assigns of all or any of the sub-divisions of the said lands for a cash consideration, the party of the first part on payment to it of seventy-five (75) per cent. of the price paid to

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the party of the second part therefor, or seventy-five dollars (\$75.00) per acre whichever shall be the greater sum will by a good and sufficient deed or deeds in fee simple grant and convey to the party of the second part, his heirs or assigns, such sub-division or sub-divisions so sold as aforesaid.

“And also shall and will suffer and permit the said party of the second part, his heirs and assigns to occupy and enjoy the same until default be made in the payment of the said sums of money above mentioned, or the interest thereon or any part thereof on the days and times and in the manner above mentioned; subject nevertheless to impeachment for voluntary or permissive waste.

“And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to re-sell the land and all payments made hereunder shall be absolutely forfeited to the party of the first part.

“It is hereby expressly agreed that the said party of the first part is not to be bound to furnish any abstract of title, or produce any title deeds or other evidence not in its possession or control, or to give copies of any title deeds, but that the party of the second part is to search the title at his own expense, and if said party of the first part without any default on his part shall be unable to make a good title to the said land within ninety (90) days from the date hereof (if the party of the second part declines to take such title as it is able to make), then he may withdraw from this contract on the repayment to him of any sum of money paid on account of said purchase money and without being entitled to any compensation or expenses in connection therewith.”

What happened was this: The first instalment of \$2000 was duly paid on the execution of the agreement. The second instalment of \$5000 with interest as provided by the agreement was not paid on the day fixed for payment. The date of payment, which by the terms of the agreement was to be on or before June 14, 1910, was extended to July 7, 1910. On July 8 Kilmer

wrote to the secretary explaining the circumstances which prevented his making the payment on the 7th, but promising to pay without fail on Tuesday, the 12th. On the 9th the secretary of the company sent a telegram saying the deal was off, and on the 1st of August following the respondent company brought this action to enforce their rights according to the strict letter of the agreement. This was met by a counter-claim asking for specific performance, and the money which ought to have been paid on July 7 was paid into Court and remains in Court to the credit of the action.

The circumstances of this case seem to bring it entirely within the ruling of the *Dagenham Dock Case*. (1) It seems to be even a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.

Clause 1 is not without a bearing on this view of the case. The purchaser was to be at liberty to subdivide the property, the vendor was bound to assent on receiving three-fourths of the money for which the sub-divisions might be sold. And yet the vendor, if his construction of the agreement be right, reserved the power of forfeiting the money paid in respect of these sub-divisions, because it will be observed that the conveyance of the sub-divisions was not to be made to the respective purchasers, but to Kilmer and the party of the second part.

Other points were raised in the course of the argument, but their Lordships do not think it necessary to refer to them.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, and the judgment of the Court of Appeal be discharged with costs, and the judgment of the judge at the trial restored. The respondents must pay the costs of this appeal.

Solicitors for appellant: *Maddison, Stirling, Humm & Davies*.

Solicitors for respondents: *Armitage, Chapple & Macnaghten*.

(1) L. R. 8 Ch. 1022.

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HERBERT AND OTHERS RESPONDENTS.

Revenue—Duties on Land Values—Valuation—“Assessable site value”—Minus Value—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 25, sub-s. 4.

In making the valuation required by the Finance (1909-10) Act, 1910, to be made for the purposes of the land taxes imposed by that Act, “the assessable site value of land,” ascertained in the manner provided by s. 25, sub-s. 4, of the Act, may be shewn as a minus quantity.

Decision of the Lords of the Court of Session in Scotland named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Act (1912 S. C. 948) reversed.

APPEAL from an interlocutor of the Lords of the Court of Session in Scotland named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts (Lord Johnston, Lord Salvesen, and Lord Cullen) upon a case stated by a referee appointed under the Finance (1909-10) Act, 1910 (1912 S. C. 948), and from a consequential interlocutor as to expenses.

The respondents were the proprietors of Nos. 57 to 69, Westend Park Street, in the city of Glasgow, the amount of feu duty payable yearly by them being the sum of 52*l.* 13*s.* 9*d.*

On June 26, 1911, a provisional valuation of the respondents' property was made under the Finance (1909-10) Act, 1910. (1)

(1) Sect. 25 of the Finance (1909-10) Act, 1910, which was in Part I. of the Act and was the first of a group of sections headed “Valuation for purposes of Duties on Land Values,” provided as follows:

Sub-s. 1: “For the purposes of this part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing

seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.”

Sub-s. 2: “The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

In this valuation the results obtained were as follows :—

The original gross value was fixed at 4828*l*.

The difference between the gross value and the value of the fee simple of the land divested of buildings, trees, &c., was fixed at 4320*l*.

The original full site value (arrived at by deducting the second of these figures from the first) was fixed at 508*l*.

The fixed charges, consisting of feu duty, ground annual, or tack duty, as capitalized were fixed at 1053*l*.

The original total value, arrived at by deducting the fixed burdens (1053*l*.) from the gross value (4828*l*.), was fixed at 3775*l*.

The original assessable site value, arrived at by deducting from the total value (3775*l*.) the same amount as was to be deducted

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land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon."

Sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the thirtieth day of April nineteen hundred and nine, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made

on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final."

Sub-s. 4: "The assessable site value of land means the total value after deducting—

"(a) The same amount as is to be deducted for the purpose of arriving at full site value from gross value;" (and (b), (c), (d), and (e), the amount of certain elements which did not exist in the present case).

"Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section."

Sub-s. 5 was not material to the present case.

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The sole question upon this appeal was whether in making the valuation required by the Act the original assessable site value could be shewn as a minus quantity.

The respondents appealed to the Reference Committee under the Act against the original assessable site value fixed by this valuation, and the appeal was heard by a referee. The referee fixed and determined (first) that the original assessable site value of the land forming the subject of the appeal was minus 545*l.* But if it should be decided by a competent Court of law that a minus original site value was illegal under the Act above cited, then he alternatively fixed and determined (second) that the original assessable site value of the land in question was nothing (or nil). In the event of the first alternative being upheld he found no expenses due to or by either party. In the event of the second alternative being upheld he found the appellants (the present respondents) entitled to expenses.

The Lords of the Court of Session recalled the first finding of the referee and affirmed his second finding.

1913. April 3, 4, 7. *Sir John Simon, K.C. (Solicitor-General)*, and *J. A. T. Robertson* (of the Scottish Bar) (*Sir Rufus Isaacs, K.C. (Attorney-General)*, *A. M. Anderson, K.C. (Solicitor-General for Scotland)*, and *W. Finlay* with them), for the appellants. The directions of s. 25 of the Finance Act of 1910 are free from ambiguity and must be construed literally. Applying these directions to the present case it is impossible upon the agreed figures to arrive at any other "assessable site value" than minus 545*l.* This result leads to no difficulty. The assessable site value is not the thing which is taxed, but is merely a conventional measure created by the Act for the purpose of ascertaining the increment value, upon which the duty is levied. Increment value is defined by the Act as the amount, if any, by which the site value of the land on the occasion on which increment value duty is to be collected (which has been termed the occasional site value) exceeds the original site value, which means the assessable site value. The object of s. 25 was to provide a datum line in

relation to which positive increases of values might be measured, and for the purpose of calculating differences it is immaterial whether that line is provided by a positive or negative quantity. Increment value, no doubt, must be a positive thing, but it is not the less so because the change is from a larger minus value to a lesser minus value. The construction contended for by the respondents, that value necessarily means positive value, would lead to absurd and illogical consequences.

Clyde, K.C., and *Hon. William Watson* (both of the Scottish Bar) (*Ryde, K.C.*, with them), for the respondents. Increment, which is to be taxed under this Act, is an appreciation in the value of the site of land due not to capital expenditure but solely to the intensification of the public demand for land in the locality, and the main purpose of the Act was to entitle the Government to one fifth of that appreciation. In defining "assessable site value" the Legislature, as elsewhere in the Act, used the word "value" (which is not defined by the Act) in its ordinary and popular sense as referring to something having a positive value and not in an algebraical or symbolical sense as including a minus quantity. "Land" is defined negatively in s. 41 as excluding any incorporeal hereditament issuing out of the land, and in s. 42, in the application of the Act to Scotland, as excluding the estate of superiority, including the right to feu duty. There may be, as occurs in the present case, two interests in the land and in the site value, and there may be a question to which of these two interests the appreciation belongs. But superiority being excluded by the statute, the problem to be solved is what is the assessable site value of this land so far as the vassal's interest is concerned. Upon the figures that value is nothing. If the increase in the site value is merely from a larger negative value to a lesser negative value the only result is to enhance the value of the security of the superior. The vassal becomes no richer thereby, and if that change in the negative value is to be taxed he must meet the tax out of his other property. That cannot have been the intention of the Legislature. Moreover, the construction for which the appellants contend is inconsistent with the other provisions of the statute. Sect. 3, sub-s. 5, provides that "for the purpose of the

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collection of duty on the increment value of any land under this section, the increment value shall be deemed to be reduced on the first occasion for the collection of increment value duty by an amount equal to ten per cent. of the original site value of the land," which by the terms of s. 25, sub-s. 4, means assessable site value. If the appellants' contention is sound this provision, when applied to a case where the assessable site value is a minus quantity, will result in an increase instead of an abatement of the increment value. Sect. 16 and s. 17, sub-s. 1, which deal with undeveloped land duty, point in the same direction. All these provisions are consistent only with the view that the Legislature was using the word "value" in the sense of positive value.

Sir John Simon, S.-G., replied.

The House took time for consideration.

May 2. VISCOUNT HALDANE L.C. My Lords, the question which comes before the House for determination in this appeal is one of an entirely novel character. It is whether, in making the valuation of the site value of land required to be made by the provisions of the Finance Act of 1910, for the purposes of the new land taxes which the Act imposes, the original assessable site value which has to be ascertained may be shewn as a minus quantity. The argument for the Crown, which was appellant, is in substance that while it is admitted that the site value which is the subject of these taxes must always be a real element in the actual value of the land, the statutory calculations in which that real element appears may, with a view to the measurement of its subsequent increase, have to express it, in an appropriate valuation account, under the guise of a minus figure, just as might be the case in measuring with a Centigrade thermometer the rise from a temperature below the freezing point. It is therefore said that while this mode of measurement appears artificial, and may present the original site value under the form of a negative quantity, it is not really different from the procedure of a surveyor who measures the difference between quantities below and above a datum line arbitrarily selected for convenience in reckoning, and that it is a way occasioning no injustice of ascertaining a factor required for

the measurement of the actual and positive value which is to be the subject of taxation.

By the respondents, on the other hand, it is contended that, reading the statute as a whole, it appears that what is called in it original assessable site value must always, if it exists at all, be shewn as an actual and positive amount. And it was pointed out that in one case at all events the statute in terms directs a reduction to be made of 10 per cent. of the site value, a reduction which would be nugatory and impossible if that value could be shewn as a minus amount.

In order to make clear the meaning of the question thus raised I turn to the scheme of levying duties on land values enacted by the Finance Act of 1910. Part I. of the Act, which contains this scheme, consists of forty-two sections. Of these sections, the first twenty-four relate to the levy of duties and the remainder to the machinery of valuation for the purpose of these duties and to other matters of a miscellaneous character. Part I. commences by enacting a charge of duty on what it calls the increment value of land, defined by s. 2 to be the amount (if any) by which the site value of the land, on the occasion on which increment duty is to be collected, exceeds the original site value. The value to be taxed must have accrued since April 30, 1909.

The next duty imposed by Part I. is reversion duty, which is to be paid by the landlord on the value of the benefit accruing to him by the determination of a long lease. This value is to be the amount by which the total value, after deduction of so much as is attributable to works executed or expenditure made by him during the lease, exceeds the total value at the date of the lease.

The third duty imposed is undeveloped land duty at the rate of one halfpenny per annum for every twenty shillings of the capital amount of the site value of undeveloped land of certain kinds, with a special provision that the duty is not to be charged where the site value does not exceed 50*l.* per acre.

The fourth of the group of duties imposed under Part I. is the mineral rights duty, but this it is unnecessary to refer to for the purposes of the present case.

I now come to the sections which provide for the valuation required for the measurement of the values so to be taxed.

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My Lords, in approaching the controversy as to the meaning of these sections I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated.

I will now consider the valuation sections. Sect. 26 directs a valuation to be made of all land in the United Kingdom as on April 30, 1909. It is to shew separately the total value and the site value of the land, and the definition of these terms is to be found in s. 25, which is of cardinal importance for the purposes of this appeal. That section defines four separate kinds of value—gross value, full site value, total value, and assessable site value. The object is, by means of valuation based on these definitions and carried out in a fashion which is prescribed, to provide a standard by which assessable site value may be measured. Such a standard is necessary, for in the case of increment duty s. 2, to which I have already referred, defines the increment value on which the duty is to be levied as the difference between the site value when the duty is to be collected and the original site value.

These two site values therefore appear as figures one of which is to be subtracted from the other; as terms the importance of which is that they bear a relation to each other which enables such a sum to be done. But on reference to the rest of s. 25

it will be seen that while site value is regarded in the statute as signifying a real element in the value of land, it is an element which the statute separates from the rest of that value only notionally, and for the purposes of measurement. The method by which this is done is to begin by defining as gross value the estimated market value of the fee simple of the land as it would stand if sold free from incumbrances, burdens, charges, or restrictions. The next step is to proceed to define the full site value, and this is declared to be the amount which remains after deducting from the gross value, estimated as above, the difference between that value and the amount which the fee simple might be expected to realize if the land were sold divested of all buildings, structures, trees, &c. What is here directed to be deducted is the difference made to the selling price of the land by the presence of the buildings, structures, and trees on it, the result affording a measure of the value of the bare site. The next step is to measure what is called the total value, and this is defined to be the gross value after deducting the amount by which the sale price would be diminished if the land were sold subject to all qualifications of the absolute title, in the nature of fixed charges, public rights, easements, and covenants entered into in the public interest. It will be observed from the definition section that the expression "fixed charges" includes feu duties and ground rents, but excludes mortgages and similar incumbrances. With the aid of these definitions the Act next proceeds to lay down how assessable site value is to be ascertained.

It is what remains of the total value after deducting the same amount as is to be deducted for the purpose of arriving at full site value from gross value. In the case of gross value and full site value the land is assumed to be sold with an absolutely clear title. In the case of total value that title is treated as subject to certain specified qualifications, but the land is assumed to be sold with all its buildings, structures, trees, &c., upon it. But before the figure for assessable site value can be reached there are other and additional items which, under the provisions of s. 25, sub-s. 4, may have to be deducted from the total value. These are such parts of the total value as are attributable to works executed,

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expenditure of a capital nature for improving the land for building or business purposes, the appropriation for the use of the public of other land by the person interested, money spent on redemption of fixed charges, enfranchisement of copyholds, or obtaining release from restrictive agreements and other items mentioned. Moreover from the total value there is also to be deducted the amount which it would be necessary to spend in order to divest the land of the buildings, trees, and other things of which it is to be taken to be divested in order to arrive at the full site value.

My Lords, it is obvious that the aggregate amount of these deductions may exceed the total value as the Act defines it. The value of the buildings and other structures and of the trees on the land may be great in proportion to the total value, and so may the amount of the expenditure which is directed to be allowed for. The result may easily be that the person making the calculation will have, after ascertaining this aggregate amount, to bring out the balance of assessable site value as a minus quantity. On this the language of s. 25 appears to me to be imperative and quite clear and to afford no room for uncertainty.

And when I look back to s. 2, which deals with increment value, it seems to me that this conclusion leads to no difficulty. For the increment value directed to be taxed is, as I have already pointed out, simply the difference between present and past site value, and this difference is as real and easily measured when one of the quantities is minus as when both are plus. Julius Cæsar was born in 100 B.C. and died in 44 B.C. The period of his life-time is not on that account less real, nor does the circumstance that it commenced before the Christian era, in a time the lapse of which is consequently reckoned by minus numbers, make the aggregate of years between then and the present time the less real. The temperatures below the freezing point which is indicated by zero on the Centigrade thermometer are shewn as minus figures, but a rise in such temperatures is not the less actual because it is measured negatively.

And so in the case of increment duty, the duty in relation to which the valuation called in question in the controversy before

us becomes of practical importance, there is no difficulty. The growth in value which is marked out for taxation is not rendered the less real because of the method prescribed for its measurement. What the Act appears to contemplate is that the actual growth is to be taxed, and it lays down how the amount of this growth is to be expressed. If, as has been argued, it is wrong to enter a minus amount in the balance-sheet which the valuer has to make out, the consequence must be that notwithstanding that there has been an actual increase, measured by the difference between a minus figure and nothing, the starting point of this increase must be struck out, and the original site value entered in all cases as nothing.

Such a result would lead to great injustice. Suppose two houses side by side in a street where the site values were exactly the same originally, and had increased equally, and that in the case of one of them a lump sum price had been paid so that there was a small feu duty or none at all, while in that of the other the feu duty was substantial. The assessable site value might appear as a minus quantity in the latter case and as a positive quantity in the other. This would make no difference in the estimation of increment duty as chargeable on a rise in site value which was actually equal in both cases. But if in the latter case the original site value were entered as nothing, the result would be that the increase in the site value of the second house would be made to appear as less than in the case of the first, simply because there was a substantial feu duty. And yet there was really no difference between the two cases excepting in the mere form in which the price was paid for the site and the building upon it. The seller gets his lump sum price, or an equivalent feu duty in the second case, secured over both site and building. In either alternative his title is to a fixed sum and to nothing more. The buyer, on the other hand, gets his site and building, and an exclusive title to any rise in the value of either.

My Lords, it appears to me that the Act of Parliament is definite in its directions, and that its scheme is not ambiguous. It was pointed out by Mr. Clyde in the able argument which he addressed to us on its construction that sub-s. 5 of s. 3 does

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not, if read literally, harmonize with the interpretation I have put on the rest of Part I. For it directs that on the first occasion of the collection of increment value duty the increment value is to be deemed to be reduced by an amount equal to 10 per cent. of the original site value, which must therefore have been contemplated by the draftsman as being a positive quantity. That is true if the words are read literally and without reference to the context. But an isolated expression of this kind cannot alter the plain scheme and principle of the whole of the valuation sections. And I think the sub-section in question becomes harmonious and intelligible if original site value is read in this particular case as meaning, not the artificially expressed figure to which the last paragraph of the general definition in s. 25, sub-s. 4, refers, but original site value in the sense of what remains after deducting from the amount of the site value at the time of collection the amount which represents the increase since the original valuation of what at that time, however described in the valuer's balance-sheet, must have been contemplated by those who framed the statute as, taken by itself, an actual and therefore positive element in the value of the entire property. A similar observation may be made about s. 17, sub-s. 1, which prescribes that undeveloped land duty is not to be charged in respect of any land where the site value of the land does not exceed 50*l.* per acre. From the nature of the case and the very definition of undeveloped land, questions which may arise in the case of increment duty are excluded, and it was not necessary to provide for them.

As soon as it is realized that the deductions which have to be made in order to state the account which the statute prescribes have to be made equally when ascertaining present site value and when ascertaining original site values for the purposes of increment duty, the obscurity disappears. That these deductions have to be made in both cases is plain from the concluding words of s. 2, sub-s. 2, which gives directions to that effect. Those who framed the Act have adopted a method of working out the account which appears artificial, but which when examined carefully turns out to be necessary if the injustice is to be avoided which a different procedure would bring about in such instances

as that of the two adjacent houses to which I have referred. The true view appears to me to be that the intention is to levy the tax only on an actual increase of value, and that it is merely in order to measure this increase that an arithmetical method is used in which minus numbers may appear among other figures.

My Lords, having arrived at these conclusions as to the meaning of the valuation provisions of Part I., I now come to their bearing on the appeal before this House.

The appeal is brought against two interlocutors of the judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts. By the first of these interlocutors the learned judges overruled the decision of a referee appointed under the Finance Act of 1910, by which decision the referee had entered the original assessable site value of certain property vested in the respondents as trustees of George Herbert, deceased, and being Nos. 57 to 69, Westend Park Street, in the city of Glasgow, as minus 545*l*. The second of the interlocutors under appeal was consequential, and was a decree against the appellants for costs.

The referee decided that the original assessable site value was the minus sum I have mentioned, but he went on to say, in the case which he stated, that, if it should be held by a Court of law that such a minus value was illegal under the Finance Act, 1910, he alternatively determined that the original assessable site value was nothing, and that in the event of his first alternative finding being upheld there were to be no expenses, while if the second alternative was upheld the respondents were entitled to expenses.

The only controverted question related to the site value, and as to this the referee found as follows:—

| | £ |
|---|------|
| Gross (original) value | 4828 |
| Deductions from gross value :—Difference
between gross value and value of the
fee simple of the land divested of
buildings, trees, &c. | 4320 |
| Feu duty, ground annual, or tack duty | 1053 |
| Original full site value | 508 |
| Original total value | 3775 |

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H. L. (SC.) He went on in the case to state that it seemed to him that his
 1913 duty under the Act was clear. By s. 25, sub-s. 4, the assessable site
 INLAND value meant, he thought, the total value after deducting the
 REVENUE same amount as was to be deducted for the purpose of arriving
 COMMIS- at full site value from gross value. Applying these figures, the
 SIONERS result he reached was this:—
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| | |
|--|-----------|
| | £ |
| Original total value | 3775 |
| Deduct amount to be deducted for the
purpose of arriving at full site value
from gross value | 4320 |
| Original assessable site value = ... | minus 545 |

The Court of Session held that, reading the Act as a whole, an assessable value could not be a minus quantity, and on this ground they overruled the decision of the referee and gave judgment to the effect that the value in question must be entered as nothing. They seem to have been impressed with the idea that upon the principle adopted by the referee the owner of the site held it under burdens which prevented him from getting any benefit from it until it had appreciated to a positive quantity, and that until then the appreciation accrued for the benefit of the holder of the feu duty or other fixed charge. The answer to this is that what will be taxed when increment duty is levied will be not the original site value, but the increase in site value, an increase which must always accrue for the benefit of the fiar, and can never increase the amount of the feu duty or other fixed charge. The fallacy in the judgments of the learned judges appears to me to be that they took original site value, which is nothing but a formula for measuring a real element of increase in value, as intended to be by itself a definition of an assessable value. With all deference to the learned judges, I think they have misconceived the machinery of the statute, and that the referee, whose decision they disturbed, was right in the conclusion he came to.

For these reasons I move, my Lords, that the two interlocutors of the Court of Session be recalled, and that it be declared that the first or principal decision of the referee was right.

LORD ATKINSON. My Lords, this is in substance an appeal against an interlocutor dated April 18, 1912, of the Lords of the Court of Session, named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts, on a case stated by way of appeal from a referee under s. 33 of the Finance (1909-10) Act, 1910. It appears from the case that the referee had fixed the original assessable site value, as he styles it, of the proprietary estate and interest of the testamentary trustees of one George Herbert, deceased, in premises described as 57 to 69, Westend Park Street, Glasgow, at a minus quantity or sum, namely, minus 545*l.*, or in the alternative, if it should be held by a competent Court of law that the original assessable site value cannot under the Act be legally fixed at a minus sum, he fixed it at nil. By the interlocutor appealed from, it is, as I understand it, decided that it is illegal to fix this original assessable site value at a minus sum, and that the alternative decision to fix it at cypher would under the circumstances of the case have been right. At pp. 7 and 8 of the case the referee has set out in detail in figures the values in money necessary to be ascertained, and the deductions and calculations necessary to be made under the statute to arrive at the original site value of the land. These values are, or must for the purposes of this appeal be taken to be, accurate, and the deductions and calculations taken to have been properly made, so that the sole question for discussion is this: Is it lawful under the provisions of this Finance Act to fix the original assessable site value of land to which Part I. of the Act applies at a minus sum?

Part I. comprises forty-two sections. Of these ss. 1 to 12 inclusive deal with increment value duty; ss. 13 to 15, both inclusive, with reversion duty; ss. 16 to 19, both inclusive, with undeveloped land duty; and ss. 20 to 24, both inclusive, with mineral rights duty. By ss. 25 to 34, both inclusive, machinery is set up for the purpose of ascertaining and determining the amounts of these several descriptions of duties. Sect. 41 is a definition clause, and s. 42 contains provisions adapting the statute to Scotland.

The definitions are matters of importance. In the former of these two sections the word "land" is defined negatively, i.e., as

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not including any incorporeal hereditament issuing or granted out of the land. In s. 42 it is defined, as to Scotland, as not including amongst other things "any servitude, superiority, casualty, feu duty, or ground annual, or any incorporeal heritable right." The expression "rent-charge" is defined in that section as including "feu duty and ground annual." The expression "interest" in relation to land is defined as not including, amongst other things, any tiends, servitudes, or superiorities. The expression "owner" is defined as the fiar of the land except where the land is let on lease for a term of which more than fifty years are unexpired, when the lessee is to be deemed the owner. It also includes an institute or heir of entail in possession. The expression "freeholder" is defined to include a fiar, life-renter of land settled within the meaning of the Finance Act of 1894, and an institute or heir of entail in possession. The expression "fixed charge" is in s. 41 defined to mean, among other things, a rent-charge, and as a rent-charge includes a feu duty, the latter is, therefore, a fixed charge. It is a fixed charge upon the land and everything upon it, invariable in amount, though, of course, if capitalized, as it must be under s. 32, its capital value may vary according as it is well or ill secured, but the superior to whom the feu duty is payable is not an owner of land within the meaning of the Act. He has not by virtue of his superiority even an "interest" in the land within the meaning of the Act. He pays no taxes on any increment in value such as this case has in contemplation, and has no concern with the calculations by which the amount of that increment is determined.

Now the general policy of Part I. of the statute (certainly as to all the subjects of property other than minerals), so far as revealed by its provisions, is in its main outline apparently this, to levy a heavy tax on the kind of increment in the value of land used, or suitable to be used, as a site or sites for buildings, which is not attributable to the expenditure of capital by or on behalf of the owner for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture. The increment in value arising from an increased demand for building land due to an increase in the wealth or numbers of the surrounding or adjacent population,

to its progress in trade or manufacture, or to works carried out at the expense of the municipality within the limits of which the lands are situate, and such like things, the unearned increment as it is popularly called, it is alone designed to tax. Purely agricultural land and some other classes of land are expressly exempted from liability. Special provisions are introduced dealing with undeveloped land duty and reversion duty, and certain conditions and qualifications are prescribed as to the application of this principle in particular instances, but the above are, I think, the chief features of the policy. With the merits or demerits of this policy this House in its judicial capacity is, of course, in no way concerned. Its task is to ascertain from the provisions of the statute itself what the policy is, and, when ascertained, to apply that policy so far as those provisions will permit. It was easy to select the punctum temporis from which the increment in value to be taxed should be taken to have commenced to accrue. This is done by s. 26. It is April 30, 1909.

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The difficulty was to fix the particular value which was to be taken to have increased, and by the comparison of which with some other value the amount of the increment could be measured. Whether these two values be fictitious or actual, positive, and real or the contrary, is wholly immaterial, provided only that a comparison between them can be made, and that that comparison, if made, will furnish a true measure of the amount of the increment.

By two of the machinery sections, namely, ss. 26 and 27, the Commissioners named in the Act are required, as soon as may be after its passing, to cause a valuation to be made of all the land in the United Kingdom, shewing its estimated total value and site value respectively as on April 30, 1909.

They are also required to serve upon the owner of every piece of land with which they deal a copy of their valuation of that land. It is called a provisional valuation because the owner may object to it; machinery is set up for determining the validity of his objection, and, if need be, amending the valuation according to the result. If no objection be made, or if made be overruled, or if allowed and the valuation be amended accordingly, the

H. L. (Sc.) values mentioned in this valuation as it was originally framed
 1913 or as amended, as the case may be, are to be the original total
 INLAND value and the original site value of the land for the purpose of
 REVENUE the Act.
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 HERBERT. Some rather fanciful estimates have to be made and elaborate
 calculations resorted to to fix, in conformity with the policy and
 Lord Atkinson. provisions of the Act, this original site value, this datum line, as
 it were, from which the increment in value is to be measured.

Sect. 1 is the taxing section. It imposes a duty on the increment value of land at the rate of 20 per cent., and treats that value as accruing after April 30, 1909. It also specifies the occasions upon which the duty is to be collected. Sect. 2 shews what is the nature of the increment to be taxed, indicates how it is to be measured, its amount ascertained, and the occasions on which the duty is to be collected. By sub-s. 1 of this latter section it is provided that the increment value on any one of these occasions shall be deemed to be the amount, if any, by which the site value on that occasion exceeds the original site value. As far as this function of the site value is concerned it does not matter, it would appear to me, in the slightest whether the fixed starting point is indicated by a plus sum or symbol or by a minus sum or symbol, because the difference between minus 500*l.* and minus 100*l.* is 400*l.*, just as truly as the difference between plus 100*l.* and plus 500*l.* is 400*l.* For instance, if the original site value be taken as minus 500*l.*, that is, 500*l.* less than nothing, and the site value at the time when the duty falls to be deducted be taken at minus 100*l.*, that is, 100*l.* less than nothing, there would still be as truly an increment of 400*l.* in the value of the land as if the original site value had been fixed at plus 100*l.* and the site value at the time the duty fell to be collected had been found to be plus 500*l.* The increment in both cases would be precisely the same, and should be taxed in the one case as in the other.

Again, if the decision appealed from were right, and if, although the methods for ascertaining the original site value prescribed by the statute should bring out a minus sum, 500*l.*, its value should be fixed at cypher, the result would be that though the value of the property as building ground increased by 1000*l.* the

site value at the date of collection of the duty would only appear as plus 500*l*. The true increment would not be taken as its undoubted amount, 1000*l*., but only at half that amount, 500*l*., since it would only exceed cypher by that sum. Sub-s. 1 of s. 2 prescribes the mode and method by which the site value is to be ascertained upon the occasion when the duty falls to be collected. The words occurring at the end of sub-head (*d*) of that sub-section take one forward to the 25th section, as they provide that from the values mentioned in sub-heads (*a*), (*b*), (*c*), and (*d*) deductions are to be made like those to be made under the general provisions of the Act as to valuation for the purpose of arriving at the site value of land from the total value. These general provisions are contained in this 25th section. They must necessarily be applied by the Commissioners for the first time when these officials proceed under ss. 26 and 27 to fix the original site value, and they must be again applied when the occasional site value has to be ascertained, namely, when the duty falls to be collected. The deductions thus authorized, indeed made imperative, are so many and so considerable that they must often produce, as they have produced in this case, a minus result; but as they are to be made at both ends of the scale, as it were, the upper and the lower, in ascertaining the two site values, the original and the occasional, the comparison between the amounts of the two values, even if over-reduced, will still furnish a true test and measure of the actual increment.

Now s. 25 provides in effect (1.) that the gross value of land means its market value if sold as it stands free from incumbrances; (2.) that the full site value is what remains after the difference between this market price and the sum which the land would fetch in open market if sold divested of all buildings and other structures upon it, timber, fruit trees, &c., has been deducted from the gross value.

Then total value (sub-s. 3) means this gross value after certain deductions have been made from it. These deductions are of a peculiar nature. In the present case the only one of the things enumerated in sub-s. 3 which affects the land with which the case is conversant is the fixed charge, the feu duty. The capitalized value of this duty has been found to be 1053*l*.

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H. L. (SC.) The gross value of the premises has been estimated to be
 1913 4828*l.*, the deduction from which of this sum of 1053*l.* leaves the
 INLAND sum of 3775*l.* as the total value. Further deductions have, how-
 REVENUE ever, to be made under sub-s. 4 from this total value to obtain
 COMMIS- what is unhappily styled "the assessable site value of the land."
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 HERBERT. This is a most misleading expression. It suggests the idea that
 Lord Atkinson. site value itself is assessed with a duty, is taxed. Site value is
 neither assessed nor taxed. That is plain from s. 1. What is
 taxed is the increment in the site value, starting from the original
 site value, and in my view it is clear that the "assessable site
 value" mentioned in s. 25 is and must be the same thing as
 "the original site value" mentioned in s. 2, sub-s. 1.

In the present case the only additional deduction to be made from the total value is that mentioned in sub-head (a) of this sub-s. 4. It is formidable in amount. On referring to sub-s. 2 of this section it will be found to be the difference between the gross value and the market value of the fee of the land if sold, divested of all buildings, timber, &c. That has in this case been fixed at 4320*l.*, which, if deducted from the total value of 3775*l.*, leaves, of course, a minus balance of 545*l.* This looks, no doubt, an absurd result, but if it be applied to a supposititious case, such as the figures in this case will enable one to deal with, as part of the machinery for measuring the amount of the increment to be taxed, it will, I think, be found to work out satisfactorily. Suppose, for instance, the owners in the present case had spent 1000*l.* on improving the buildings on their land, and by reason of that expenditure, and that alone, had raised the market value of the premises, if sold free from incumbrances, by 1000*l.*, and had, in fact, sold the premises so improved for 5828*l.*, on the transfer of the property an occasion would arise for the collection of the increment value duty. The site value of the land should then be taken to be the purchase-money, less the deductions authorized by s. 25 (sub-s. 3 and 4 (a)). But these deductions would not then be confined to the capitalized value of the feu duty, and the sum of 4320*l.* If these alone were deducted it would shew an increment in site value of 455*l.*, whereas, ex hypothesi, there has been no such increase. Another deduction would have to be made, that mentioned in sub-s. 4 (b) of s. 25,

namely, that part of the total value proved to be attributable to the expenditure by the owners of 1000*l.* in rebuilding. This would presumably be 1000*l.* When this sum is also deducted from the total value, it leaves the site value determined for the occasion at minus 545*l.*, the same as the original site value. This is quite as it should be, since, *ex hypothesi*, there was no increase in the site value.

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The figures do not enable one to take a case where the gross value of the land as it stands is increased from causes other than capital expenditure, since the market value of the denuded land under such circumstances has not been found.

Gross value, total value, full site value, are, no doubt, all real things, actual positive values. It does not necessarily follow, I think, that occasional site value must always be a real thing, an actual positive value. Circumstances might conceivably occur in the locality between the time the original site value was fixed and the time when the occasional value had to be fixed which would cause a great diminution in the value of the land, both in the state in which it stood and as a building site. The occasional site value would then be less than the original site value, and in such a case the former would properly and necessarily be indicated by a minus sum or quantity if the original site value was itself indicated by 0.

My Lords, with all respect to the learned Lords who have pronounced the interlocutors appealed from, it would appear to me that they have not steadily kept in view what is the true function of this original site value when ascertained, the particular purpose which it serves in Part I. of this statute. The main, if not the only, purpose which it serves is, as I have said, merely to fix the datum line from which the taxable increment in the value of the particular piece of land shall be measured on the occasion when the duty on that increment falls to be collected.

The fact that it is indicated by a minus sum or quantity cannot, I think, be held to prevent its serving this purpose, any more than it could be held that the increasing temperature of mercury from the freezing point upwards could not be measured by a Fahrenheit thermometer because the freezing point of

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1913 zero.

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In my opinion the comparison between the original site value and the occasional site value where both are fixed in conformity with the statute will furnish, in this and every other case, a true measure of the amount of the increment value which is to be taxed, and I cannot find anything whatever in the statute to justify the fixing of the original site value at any figure different from that arrived at by following the methods expressly prescribed in the statute.

Mr. Clyde in his most able and ingenious argument on behalf of the respondents relied much on the provision of s. 3, sub-s. 5, to shew that the original site value could not be a minus sum or quantity, inasmuch as that sub-section directs that on the first occasion on which the so-called occasional site value is to be fixed 10 per cent. of the original site value is to be deducted, and 10 per cent. of a minus quantity could not be deducted, or if deducted, would result in an increase of the occasional site value. Well, though this last result would not follow from a deduction of 10 per cent. of nothing if the original value was fixed at nil as it has been by the interlocutors appealed from, still the provisions of the sub-section, I think, do indicate that the framers of the statute did not contemplate that the original site value should ever be reduced to a 0 or to a minus quantity; or it may be that the words "original site value" have been used in some sense different from that which they bear in s. 2, sub-s. 1; or lastly, I suppose, that they have crept into the sub-section by mistake. He suggested, as I understood, that the words "full site value" should be substituted for "original site value."

Speaking for myself, I may say that I do not, as at present advised, see my way to a satisfactory solution of the difficulty he has raised.

The House is not required, however, to construe s. 3, sub-s. 5, on the present occasion. It is therefore unnecessary on this appeal to express any decided opinion as to its meaning. Upon the only question we have to decide, namely, whether it is legal to fix the original site value at a minus sum or quantity, I have formed a very definite opinion in the affirmative. I think it is

lawful so to do, and if the provisions of the Act are to be carried out it is necessary to do so. And I am further of opinion, for the reasons already given, that this will in no way prevent the site value serving efficiently and justly the purpose it was designed by the Act to serve. I therefore think the decision appealed from was wrong and should be reversed, that the original site value should be fixed at minus 545*l*., and this appeal be allowed.

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LORD SHAW OF DUNFERMLINE. My Lords, this appeal to your Lordships' House is regarded as of importance, not only because it is said to affect a principle upon which the entries with regard to land values are to be made by the officers charged with that duty under the Finance Act, 1910, but also on account of the large number of values throughout the kingdom which the principle affects.

Importance in various passages of the judgments of the Court below is rightly attached to the objects of the statute. One of the chief of these is that to be achieved under s. 26. By that section (sub-s. 1) it is provided that "the Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land." I exclude the reference to agricultural land, with which this case is not concerned; but the section goes on to provide that each piece of land under separate occupation shall be separately valued. And the estimate of value is to be made as on April 30, 1909.

To all intents and purposes, my Lords, this is a statutory requirement for the formation of a Domesday Book, and the object cannot be accomplished unless all land in the United Kingdom is included in that book. The two items which must appear with regard to every piece of land under separate occupation are the total value and the site value thereof respectively.

With regard to each and all of these terms the statute explains, and, in my opinion, clearly and sufficiently explains, their meaning. I think it right to say so, and, looking to the complexity

H. L. (SC.) of the subject, and having in mind the pressing conditions under which modern legislation is accomplished, to say so emphatically. 1913
 INLAND REVENUE COMMISSIONERS v. HERBERT. Its drafting in subsequent cases will, no doubt, have to be as minutely analysed as it has been in the present; but upon the only point which your Lordships have to determine I do not myself see how language could have made it clearer.

Lord Shaw of Dunfermline.

That point is, What is site value? Mr. Binnie, a skilled valuer, having reached his results by conforming simply to the provisions of the Act, is able to make his calculations with brevity and entire clearness; and he makes these two remarks. He says, "My duty under the Act is clear and unambiguous," and in a later portion of the stated case he says, "I do not see how, having regard to the directions in section 25, it is possible to arrive at any other conclusion." My Lords, I think that Mr. Binnie—addressing himself, as he manifestly did, to no other task than that of conforming to what the statute has laid down—was justified in both of these observations. The statute in no way confused him; his figures and calculation appear on half a sheet of paper. I think this result arose because the terms of the statute as well as of his duty were so plain.

Having in view accordingly this main object of the statute, namely, the formation of a Domesday Book, or a valuation of all land in the United Kingdom, shewing separately the total value and site value of each separately occupied portion of it, I ask myself what, according to the Act, is the meaning of these terms? In the first place as to the meaning given to "land." Land has been already defined by the Interpretation Act of 1889, and by s. 42 of this Finance Act it is further declared that land does not include superiority, casualty, feu duty, or ground annual; nor does "interest" in relation to land include superiorities.

My Lords, there was a considerable discussion and exposition at your Lordships' Bar of the system of landed rights in Scotland. With regard to these I will only observe that the policy of this statute, as well as its provisions, appears to me to be fairly clear. It is no doubt true that the right of a superior—the dominium directum—is in law an estate in land under the feudal system just as much as under that system is the right of the vassal whose estate in land is denominated the dominium utile.

But the situation of parties must also be viewed from the standpoint of business, of possession, and of finance. One would not unnaturally expect that this last, and not the other, is the standpoint of the Act.

The subject being so viewed (and casualties and occasional payments being for the sake of simplicity discarded), the superior is the recipient from the vassal of a feu duty. The vassal is the person holding the land by a permanent and substantially infeasible tenure; and howsoever property may improve in value, the increment in that value is secured by the vassal alone. The rights of the superior are financially nothing more nor less than the right to draw a fixed sum secured upon the land from the vassal. Within the range of finance and actual management that is how the matter stands. In the region of feudal conveyancing it is true that the right of the superior, being a right in the land itself, can in certain circumstances be amplified or made effective, so far as practical result goes, by the remedy called an irritancy ob non solutum canonem, that is to say, the entire subject can be made to revert to the superior if the vassal is two years in arrear with his feu duty.

I have purposely made these observations in the most general form because I desire to state broadly that I do not think a Finance Act in the United Kingdom ought to be—unless that be logically compelled—diverted from its plain financial object and meaning by considerations which do not touch general finance but affect merely the feudal conveyancing of land in Scotland. As I have already mentioned, so far as finance is concerned, the true owner who will get the benefit of any rise in the value and who is in that sense the beneficial owner interested in the taxation upon land value, and also in the increment thereof, is the vassal, the owner of the dominium utile. And so far as the superior is concerned, he is placed by the statute exactly as what in the region of finance he is, namely, a person having a right to a fixed payment subject to no increment by change in economic or market conditions. Accordingly he and the bondholder or mortgagee are quoad finance upon the same footing. The superior drawing his feu is treated like a mortgagee drawing his interest. He takes a fixed sum per annum. No doubt in

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one case, as in the other, were that fixed sum not paid certain drastic remedies and consequences might follow; and no doubt in the one case, as in the other, if the gross value of the subject goes up the feu duty or the loan becomes better secured; but so far as the land is concerned the beneficial owner is the vassal, and the land dealt with by the Act is the vassal's land.

My Lords, this, which would seem the natural and reasonable view to take of a financial statute, is entirely confirmed by its various terms. Under what clause, for instance, does feu duty come? By s. 25, sub-s. 3, there is a reference to fixed charges. What are these? By s. 41 the expression "fixed charge" means "any rent-charge." That term is also defined by the statute. In the application of the Act to Scotland by s. 42 "the expression 'rent-charge' includes feu duty." Feu duty accordingly is treated like any other fixed charge. In particular, because all feu duty is drawn by a superior, and because a superior has an estate in the land itself under the feudal system—all this is wiped away in a financial statute. The vassal is the owner, and one of the fixed charges he pays is his feu duty. It is only, my Lords, in view of a protracted argument in your Lordships' House that I have ventured to state these things, which are rescued from confusion and made so plain by the text of the statute itself. Having thus ascertained what the term "land" is, and disentangled it for the purposes of the Act from the superior's rights, the next thing, under s. 26, is that all land must appear in the valuation. Therefore all land under contract of feu must there appear, and the land which there appears is the vassal's right, and the vassal's alone, the superior's right having fallen into the category of what financially it truly is, a fixed charge upon the vassal's land.

The second term applicable to the making of the Domesday Book, under s. 26, is that, while all land is to appear, the valuation is to shew separately the total value and the site value. What, then, is total value? That is made clear by s. 25, sub-s. 3: "The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges." By sub-s. 1 the

gross value is explained to mean the open market value of the whole subject with all the buildings, &c., upon it, and free from incumbrances. So that to get the total value you have simply to deduct from the gross or market value the amount of the fixed charges. So far as total value is concerned, that is a very simple calculation. If the gross market value was 5000*l.*, and the fixed charges (in this case the feu duty when capitalized) were 1500*l.*, the balance would be "the total value," namely, 3500*l.* This separate entry in the Domesday Book is the result of a simple calculation.

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The next statutory entry in the valuation is the site value. How is that to be arrived at? In the previous section site value (I dismiss the reference to the parenthesis, which does not apply to the present occasion) "shall be deemed to be a reference to the assessable site value." Under s. 25, sub-s. 4, "The assessable site value of land means the total value, after deducting (a) the same amount as is to be deducted for the purpose of arriving at full site value from gross value." Various other deductions are to be made from total value, but they do not occur in the present case and need not be referred to. Now, gross value was the unincumbered market value of the whole subject, including the buildings, &c. The full site value of land means (s. 25, sub-s. 2) the market value of the whole subject if divested of the buildings, &c. It may be called divested site value. In the case given, if the gross value were 5000*l.* and the buildings were worth 4000*l.*, the full site or divested site value would be 1000*l.*

I revert accordingly to, What is the assessable site value? It is to be the total value after deducting the buildings, &c. Now the total value was 3500*l.* Accordingly, the assessable site value means that 3500*l.*, after deducting the buildings, and these were 4000*l.* The result is demonstrably certain that there is produced a minus value of 500*l.* As Mr. Binnie says, if you proceed by the directions of s. 25, it is not "possible to arrive at any other conclusion."

But I desire to state that, if the data prescribed by the statute for the calculation be employed, this minus value which is thus reached is exactly what would be reached, not in hundreds, but

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in thousands and tens of thousands of cases in Scotland. The system of feuing land is much prized, providing as it does perpetuity and security of tenure, and giving the beneficiary increment to the vassal who erects the buildings or makes the improvements. But in the feu charter it is, by the commonest words of style, a matter of express prescription that the vassal must make the superior also secure in the feu duty by erecting and maintaining upon the lands buildings of sufficient value to afford a cover for that security. Land may be worth, in its agricultural condition, from 1*l.* to 3*l.* per acre, but, on account of its local situation and advantages, it may be feued for building purposes at from 10*l.* to 30*l.* or from 100*l.* to 300*l.* per acre. The buildings in such cases are often tenements erected upon the old Scotch system—with regard to which there is a convenient and familiar code of law; they are of several storeys in height; and they are owned, it may be, each storey, or even part of each storey, by a separate proprietor. Upon an acre of ground there thus grows up a group of proprietors, among whom the feu duty is split up under arrangements which need not be here entered upon. Where buildings of the kind described have been erected, their value is large. But, upon the other hand, the heavy feu duties, when capitalized and loaded upon the market value of the whole subject, very greatly reduce that, and so the “total value” (arrived at after this deduction) becomes relatively small in the very cases in which the value of the buildings becomes relatively high. In such cases the buildings and improvements far exceed in value the market value of a subject so heavily burdened with feu duty. The case dealt with by Mr. Binnie shews figures which must be much within the mark in common experience; but, to use the round numbers I previously employed, the gross value of the whole subject burdened with the feu duty is the total value under the statute, and is the figure of 3500*l.* The buildings and improvements are 4000*l.*, and the minus figure is demonstrably 500*l.*

I repeat these things, my Lords, because of this—that, unless this figure be so arrived at and the statute with regard to these calculations be loyally and strictly followed, one of the main objects of the statute under s. 26 will be largely defeated. As I

have mentioned, in thousands of cases of urban land in Scotland, the value of the buildings by themselves exceeds the value of the subject if loaded with a large feu duty, and it would be to sterilize the action of the officials under the statute in making a valuation of all land if these instances had to be excluded. The land of Scotland would not be wholly valued, and numberless separate occupancies would disappear. It appears to me not difficult to affirm that such a result could never have been intended by the Legislature.

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My Lords, with much respect to the learned judges of the Court below, I attach no importance whatsoever to the plan of setting down those instances in all cases with a value of nil. "Nil" is not in accordance with the arithmetical deductions which are expressly prescribed by the statute. It is a defiance of the statute. It is arrived at only after the mind has conceived the notion that there must be a positive value to start with and that the Legislature must have intended that. Once that notion is arrived at, of course, where no positive value, but only a minus value, appears, the statute cannot work unless the device is adopted of putting the figure 0. But this figure 0 is a figure of despair, indicating that no positive value can be found. It might have to be set down if the statute anywhere prescribed, with regard to the valuation as a whole, or in its details, that the value should be positive. But, my Lords, after anxious consideration, I do not find that the statute does anything of the sort.

It would, indeed, be rather extraordinary if it did, because it would be making unworkable the very figures and calculations which it expressly prescribes; and, secondly, it would be a writing out of the valuation for all purposes of true and effective comparison of values at one date with values at another the practical datum or standard line—the foundation from which all subsequent variations in the value of the property could be measured.

This last consideration is important, for another main object of the statute is the imposition of an increment value duty; and a construction which would upset or remove the very foundation upon which increment could be truly reckoned does not accord

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with reason. And, moreover, such a construction might, in those numberless cases to which I have referred, postpone the ascertainment of any increment whatsoever until decades or centuries had passed, and such an enormous rise had taken place in value as to make that value, even though loaded with a heavy feu duty, exceed that of the buildings and improvements upon the land. Not until that time would what is called "positive value" be reached, and not until that time could any figure actually representing the truth appear upon the valuation or become the measure for future increment.

The statute, my Lords, does not look at the matter in that light, for not only has it prescribed that the valuation shall be of all the land in Scotland, but it has stated that this valuation shall be as at April 30, 1909.

I incline, my Lords, with reference to the view which has been presented, and which is alluded to in the judgments of the Valuation Court, that the operation of deduction of the two specified figures may result in a minus value mathematically, but that such a result is repugnant to reality—I incline to say that, in my humble opinion, the repugnancy is in the other direction. I will venture to give the illustration which I presented to the Bar at the discussion. Assume that in ten years' time the gross market value has increased by 1000*l.*, the buildings and feu duty remaining as before. The buildings are still 4000*l.* The total value has come up to the figure of 4500*l.* And so with regard to the assessable site value, the undoubted increase of 1000*l.*—an increase which in the circumstances is unquestionably due to the appreciation of the land—is plainly accounted for by the former minus value of 500*l.* being now transmuted into a plus value of the same figure. To say that you would be entitled, notwithstanding the undoubted increment of 1000*l.*, to reduce that increment to 500*l.*, is simply to defend what was truly a fiction, of entering the original assessable value at nil instead of what it truly was, namely, minus 500*l.* So far from mathematics having led the calculator away from actuality, it has entirely squared with the truth and history of the increment.

One element derived from the statute was introduced to shew that the calculations made according to the rule set up in s. 25

were impossible. The reference was to s. 3, sub-s. 5, which provides that, "for the purpose of the collection of duty on the increment value of any land under this section, the increment value shall be deemed to be reduced on the first occasion for the collection of increment value duty by an amount equal to ten per cent. of the original site value of the land." The argument was that with a minus value assessable site value could never thus be credited with its 10 per cent. of allowance. My Lords, the argument is illegitimate, because by s. 25 that very sub-section (namely, sub-s. 5 of s. 3), which is for the purpose of the collection of duty on the increment value, is excluded from the definition of site value. By s. 25 it is provided that "any reference in this Act to site value (other than the reference to the site value of land on an occasion when increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land." The parenthetical reference is precisely to the occasion on which increment duty is to be collected, and that is the occasion set forth in s. 3, sub-s. 5, which is specifically "for the purpose, of the collection of duty." It is accordingly, I think, pretty clear that it is not legitimate to treat the reference to the allowance of 10 per cent. deduction under s. 3, sub-s. 5, as a reference to assessable site value at all. It is a reference to a site value different from the assessable site value and called for the purposes of that sub-section the original site value.

The argument was developed, however, by this: that it was stated that an actual duty was to be imposed by the statute on undeveloped land. This, my Lords, is true, and the duty is laid down by s. 16, but s. 17 clears all difficulty as to positive and negative values, or plus and minus quantities, out of the way, because by its first sub-section it prescribes, "Undeveloped land duty shall not be charged in respect of any land where the site value of the land does not exceed 50*l.* per acre." That is to say, my Lords, that when land duty is imposed as such, it is upon a site value which is positive, namely, upon land worth 50*l.* per acre and over; but when the statute is treating the problem and fact of increment, it is in the position of laying down, to begin with, the mode of settling a datum line from which in future years and on future occasions the increment shall be reckoned.

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There is no necessity whatsoever to make that datum line positive, any more than there would be for declaring—to use the illustration familiar in the discussion—that the actual fact of a rise of temperature should be differently dealt with or declared not to have occurred because the points of rise were both below zero on a Fahrenheit thermometer. The illustrations might be multiplied. The datum line for a railway system, for harbour works, for a mine, may differ (in the last-mentioned case the datum may be taken from the pithead or from the bottom of the mine), and may differ greatly, but the rise upwards is quite real and quite calculable in any of the cases mentioned, and any exclusion because of the location of the datum line and certain contours being below it would not be natural, but highly artificial. Or, in the region of history: Some Roman historians date events *ab urbe condita*, others *ab anno Domini*. But although the latter were to be set up as the correct datum, it would be strange * to deny the flight of time from the founding of Rome till the year of our Lord.

For these reasons, my Lords, I do not entertain doubt that Mr. Binnie's valuation and its entry of a minus value of 545*l.* were properly arrived at and were correct. I do not find the statute anywhere to prescribe, with regard to the making of this valuation, that the datum from which increment is reckoned is to be positive. If it were—the materials for the calculation being what they are—the result would be to render void to all intents and purposes large portions of the Domesday Book, or rather to describe the entries as nil, which is not a statement but a misstatement of the truth. The Act of Parliament, if accepted according to the rules which it itself sets down, may, so far as we have seen, and so far as applicable to the question argued before this House, be very easily worked, its rules being so clear, and the completeness of the valuation be unchecked.

I humbly agree to the course proposed.

LORD MOULTON. My Lords, the only point raised in this case relates to the proper mode of performing the duty imposed upon the Commissioners under the Finance (1909-10) Act, 1910, by s. 26 of the Act, namely, the compilation of “the valuation to be

made of all land in the United Kingdom showing separately the total value and the site value respectively of the land." It is clear from the provisions of the Act that by "site value" as here used "assessable site value" is to be understood. The point in issue is as to what is the site value, i.e., the assessable site value, of the land to which the case relates. There is no controversy as to the facts. The value of the land and buildings, the value of the bare site, and the amount of the charges thereon are all agreed. The sole issue is as to what is the "site value" of the land to be deduced from those facts.

Neither "total value" nor "site value" is a term of art. They are appellations coined for the purpose of the Act, and they bear the meanings which are statutorily given to them by s. 25 of the Act and no other. It follows, therefore, that although the dispute between the parties is in form a dispute as to the duties of the Commissioners under s. 26, it depends entirely upon the interpretation to be given to the definitions to be found in s. 25, and our decision must therefore turn on our interpretation of that section.

Sect. 25 is the first of a fasciculus of clauses headed "Valuation for purposes of Duties on Land Values." It substantially consists of four definitions, namely, definitions of (1.) gross value of land, (2.) full site value of land, (3.) total value of land, and (4.) assessable site value of land.

There is no difficulty in apprehending the meaning of "gross value of land" as there defined. It is described as meaning—

"The amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

It corresponds, therefore, to the full value of the land unincumbered. It is needless to say that the buildings on the land and all that goes with the land are here included in the term "land."

The "full site value of land" is equally easy to comprehend. It is the full market value of the cleared site. But the language of the statute, though leading to this result, does so in a very peculiar way. It defines the full site value of land as the amount

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which remains after deducting from the gross value of land the difference, if any, between that value and what I may shortly term the value of the unincumbered cleared site. The result of such a deduction is to give the value of the unincumbered cleared site. I do not think that it is obvious for what reason the draftsman chose to express the definition in so peculiar a fashion. It may be that he wished to familiarize the mind with a figure representing the difference between the gross value of the land and the full site value, i.e., a figure representing the amount which that which has been put upon the land, such as buildings, &c., has added to the full site value.

The "total value of land" also offers no difficulties. It is the value of the land subject to the actual fixed charges upon it and to public rights of way, easements, &c. It may broadly be defined as the full value of the incumbered land, and represents most closely the then value of the actual property which the owner of the land possesses in it. Here again the draftsman has adopted a circuitous mode of effecting his purpose. He defines the "total value of land" as the gross value after deducting the amount by which the gross value would be diminished if the land was sold subject to its charges, easements, &c. This, of course, leads mathematically to the same result as if it were defined as the full market value of the land taken as subject to the charges, easements, &c.

It is with regard to the "assessable site value of land," the fourth and last of the terms defined in the section, that the present difficulty arises. It is defined as meaning the total value of the land after making certain deductions which are set out in the section. For present purposes it will suffice to consider the first and principal deduction alone. This deduction is to be—

"The same amount as is to be deducted for the purpose of arriving at full site value from gross value."

The "total value of land" is the "gross value" after deducting the capital value of the actual charges upon it, and of the restrictions and easements, &c., which affect it. This may be shortly expressed by saying that it is the "gross value" less the burden of the incumbrances. The amount that "is to be deducted for

the purpose of arriving at full site value from gross value " is of course the gross value less the full site value. Deducting the latter of these quantities from the former (an operation which by the definition gives us the " assessable site value ") we arrive by a mathematical necessity at the same result as if we deducted the burden of the incumbrances from the full site value. It follows, therefore, that the " assessable site value of the land " is obtained by deducting the burden of the incumbrances from the value of the site. It is obvious to any one acquainted with the customs which prevail in different parts of the country, as to creating burdens on land on which buildings already exist or are about to be erected, that it will often happen that the burden of the incumbrances will exceed the value of the site. Nothing is more common than to create charges upon land upon which there are buildings of a permanent character, or upon which the erection of such buildings is secured by covenant. In such cases the charges so created may well be greater than the site value of the land, and the result of the deduction prescribed in the section will be to obtain a minus quantity. This is so in the present case, and the Commissioners in making out the valuation have felt themselves bound to register as the assessable site value of the land in question the minus value thus arrived at. The respondents contend that it is impossible to conceive of a value that is less than nothing, and that, therefore, the Commissioners ought to have inserted " nil " as the assessable site value of the land in question.

So far as a priori considerations are concerned I cannot follow the contentions of the respondents on this point. The " assessable site value " is something which is defined by the section and does not pretend to correspond to anything known outside the statute. In order to see whether there is any absurdity in this being a negative quantity it is justifiable, and even necessary, to look to the way in which the " assessable site value " so arrived at is to be used for the purpose of assessment of taxes. When this is done it will be found that the principal assessment based upon it is that of the increment value duty, and that the amount of this duty does not depend upon the actual amount of the assessable site value, but upon its variations. For such a purpose

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there is no incongruity in the assessable site value being a negative quantity because a negative quantity is capable of positive variations just as much as is a positive quantity. The thermometer may rise a certain number of degrees in the Arctic regions, though the temperature from which it starts is a minus one. A change from 60 degrees below zero to 20 degrees below zero is a positive rise of 40 degrees. Therefore the purpose for which the assessable site value is to be used, and for which it is necessary that a record of that value should be preserved, does not in any way indicate that it should be a positive rather than a negative quantity.

But when we look more closely into this purpose it will be seen that it is most essential that the actual result of the deduction should be recorded, whether that be positive or negative. For it is evident that the meaning and aim of the "increment value duty" is to tax any increase in the value of the site which is not due to expenditure of money on the land itself, but to surrounding circumstances, such as, for example, the development of neighbouring lands for town purposes. This will be deducible from the assessable site value provided that the actual result of the deduction directed by the statute be recorded, but it will not be deducible therefrom if negative values are not to be recorded. Take, for instance, the figures of the present case. The total value of the land is 3775*l*. The difference between the gross value of the land and the full site value of the land is 4320*l*. This latter figure must be deducted from the former in order to obtain the assessable site value of the land, and the result is minus 545*l*. Now assume that from extraneous causes the full site value is increased by an amount, say 500*l*., the burdens, &c., remaining the same. The assessable site value will then be minus 45*l*. and the increment value duty will be proportionate to this rise in the assessable site value, i.e., to 500*l*. But if the contention of the respondents be correct the assessable site value in both cases would be nil. There would therefore be no change in the assessable site value of the land, and no increment duty would be chargeable, although there has been a rise of 500*l*. in the value of the site.

The absurd inequalities which such an interpretation of the

section would introduce is best shewn by the illustration which was given by one of your Lordships in the course of the argument. Suppose that there are two precisely similar houses on adjoining plots of equal value in all respects—say two adjoining houses in a row of uniform houses—and suppose that the full site value in each case is 500*l*. The owner of the one creates a charge upon it of the capital value of 1,000*l*. The owner of the other leaves it uncharged. Suppose that the development of the neighbourhood increases the site value in each case by a sum of 300*l*. Each of the owners has had his wealth increased thereby to the same amount, i.e., 300*l*. Yet according to the contention of the respondents the one would have to pay a proportion of this increment to the State and the other would pay nothing.

I am of opinion, therefore, that both the language of s. 25 of the Act and the purpose of the valuation as shewn by s. 2 of the Act require that the true result of the deduction should be inserted in the valuation, whether that result be a plus or a minus quantity.

Against this conclusion two arguments have been put forward by counsel for the respondents, based upon other parts of the Act. In the first place, it is pointed out that assessable site value is used for the calculation of undeveloped land duty as well as increment value duty, and that in the case of undeveloped land duty the duty depends on the actual assessable site value and not on its variations. This would no doubt be an argument of weight were it not that there is a special provision in s. 17 that undeveloped land duty shall not be charged in respect of any land where the site value of the land does not exceed 50*l*. per acre. Its incidence, therefore, is confined to cases in which the assessable site value is not only a positive quantity, but is actually greater than 50*l*. per acre. No difficulty, therefore, arises in this case, nor does it throw any light upon the matter in issue.

The second argument appears at first sight to be a more formidable one. In sub-s. 5 of s. 3 it is provided that for the purposes of the collection of duty on the increment value of any land the increment value shall be deemed to be reduced on the

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The true answer to this argument is, in my opinion, to be found in the very provision as to the meaning of a reference to "site value" in the Act which is relied on for the purposes of this argument. It reads as follows:—

"Any reference in this Act to site value (other than the reference to the site value of land on the occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section."

In my opinion the words in brackets refer to s. 3, sub-s. 5, and were inserted with the special object of obviating the difficulty which it is suggested is caused by its language. It follows from those words that in s. 3, sub-s. 5, the phrase "site value" must not be understood as meaning "assessable site value," but as meaning actual or, as it is called in the Act, "full site value." This is always a positive quantity, and the difficulty therefore vanishes.

I am of opinion, therefore, that the Commissioners were right in inserting a minus quantity in the valuation as the assessable site value of the land, and that this appeal should therefore be allowed.

Ryde, K.C., asked that in the particular circumstances of this case, which was a test case raising an entirely novel point, costs should not be given against the respondents.

Sir John Simon, S.-G., left the matter in their Lordships' hands.

VISCOUNT HALDANE L.C. Under the very peculiar circumstances of this case their Lordships propose to make no order as to costs—that is to say, the parties will bear their costs here and in the Court of Session and before the referee. That is only done because the question is an entirely novel one and because in order to give it the fullest consideration the hearing has been somewhat extended.

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Interlocutors appealed from reversed and decision of the referee in its first alternative restored. No costs in this House or in the Court below or before the referee.

Lords' Journals, May 2, 1913.

Agents for appellants : *Hugh Bertram Cox (Solicitor of Inland Revenue for England), for Sir Philip J. Hamilton Grierson (Solicitor of Inland Revenue for Scotland), Edinburgh.*

Agents for respondents : *Cameron, Kemm & Co., for Connell & Campbell, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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| H. L. (E.)* | COMMISSIONERS FOR LAND TAX FOR | } | APPELLANTS ; |
| 1913 | THE CITY OF LONDON | | |
| <u>April 1.</u> | | AND | |
| | CENTRAL LONDON RAILWAY COMPANY . | | RESPONDENTS. |

Land Tax—Redemption—Exoneration—Land abutting on Highway—Presumption that Soil of Highway passes ad medium filum—Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 4, 17, 18, 80—Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 8, 38.

Where the land tax upon land adjoining a public highway has been redeemed, the presumption that the soil of the highway *ad medium filum* belongs to the owner of the adjoining land applies so as to extend the exoneration from tax to the middle of the highway.

A railway was constructed, under statutory powers, in the city of London, partly beneath a highway adjoining lands in respect of which the land tax had been previously redeemed :—

Held, that the portion of the railway under the moiety of the highway adjoining the exonerated lands was not liable to land tax.

Order of the Court of Appeal [1911] 2 Ch. 467, affirmed.

APPEAL from an order of the Court of Appeal(1), varying an order of Swinfen Eady J. (2), upon a special case.

The respondents were a company incorporated by the Central London Railway Act, 1891 (54 & 55 Vict. c. cxvii.), and by that Act and the Central London Railway Act, 1892 (55 & 56 Vict. c. cxxli.), they were empowered to construct a railway partly within the city of London. A portion of the railway was constructed partly under the surface of certain streets or highways in the city and partly under land abutting thereon. The construction of this portion of the railway was commenced in July, 1896, and completed in July, 1900. Before the completion of the railway the land tax on certain of the lands abutting on these streets or highways had been redeemed and the lands exonerated therefrom, but in no case was the highway specifically included in the contract for redemption or shewn in any plan

* *Present*: EARL OF HALSBURY, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1911] 2 Ch. 467.

(2) [1911] 1 Ch. 467.

annexed thereto. Three certificates of contracts for redemption were annexed to the special case and were selected as typical examples of such contracts. In the first certificate, dated February 3, 1804, the property upon which the land tax was charged was described as follows:—

“One messuage or tenement with the appurtenances situate in Cheapside in Saint Mary-le-Bow Precinct of the Ward of Cheap in the city of London in the occupation of Richard Clarke”

“One other messuage or tenement with the appurtenances situate in Cheapside in the said precinct and ward in the occupation of John Perrell.”

In the second certificate, dated December 7, 1867, the property was described as “vacant ground formerly two houses and premises situate and known as Nos. 36 and 37 Newgate Street in the Ward of Farringdon Within and late in the occupation of Christopher Milburn.”

In the third certificate, dated May 18, 1897, to which a plan was annexed, the property was described as “All those pieces of land now or formerly known as Numbers 85 and 86 Newgate Street and Numbers 21 and 22 King Edward Street in the Ward of Farringdon Within in the city of London more particularly delineated and described on the plan hereto annexed marked ‘A’ and thereon coloured pink,” and the respondents were described as the proprietors and occupiers thereof.

The respondents (the plaintiffs) contended that the redemption of the land tax in respect of these lands extended to the middle line of the highways upon which the lands respectively abutted; that they were not liable to pay land tax in respect of so much of their railway as was situate under any lands on which the land tax was redeemed before the completion of the railway; that they were therefore not liable to pay the land tax in respect of so much of their railway as was situate under the lands above mentioned and as extended under the surface of the said public streets or highways to the middle line thereof.

The appellants (the defendants) disputed these contentions and contended (inter alia) that there was no presumption that the redemption of land tax in respect of lands abutting on a

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public highway redeemed such tax on the land to the middle of the highway.

Swinfen Eady J. held (1.) that the respondents (the plaintiffs) were not liable to pay land tax in respect of so much of the railway as was situate under any lands which had been exonerated from the land tax before the construction of the railway, but (2.) that where the land tax had been redeemed on lands abutting on a public street or highway the redemption did not extend to the middle line of the street or highway.

The respondents appealed from the second part of this judgment.

The Court of Appeal by a majority (Cozens Hardy M.R. and Kennedy L.J., Farwell L.J. dissenting) allowed the appeal and held that the presumption applied, and that the moiety of the street or highway was in each case exonerated from land tax.

1913. Jan. 27, 28. *Sir R. Finlay, K.C.*, and *Danckwerts, K.C.* (with them *A. M. Bremner*), for the appellants. There is no presumption that on the redemption of land tax assessed upon tenements abutting upon a public street or highway such redemption exempts the half of the street or highway adjoining the tenements; but the redemption is confined to the tenements themselves. The history of the land tax, which was first introduced by 4 W. & M. c. 1, is traced by Lord Campbell in *Reg. v. Land Tax Commissioners for the Tower Division*. (1) [They referred to the Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 4, 17; the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 8, 38, 180; and the Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), ss. 10, 12 and Sched. A.] The proper evidence of the lands exonerated by redemption is the certificate of the contract for redemption, and in the certificates in evidence in this case the properties in respect of which the land tax is redeemed are described as messuages or tenements; in no instance is the site of the road included. Redemption can only take effect in respect of premises which have been actually assessed to land tax. The land tax is an annual tax assessed on the annual value, which has been interpreted as the net annual value:

(1) (1853) 2 E. & B. 694.

Reg. v. Land Tax Commissioners for the Hundred of Irychurch (1); and land which has no annual value or is not capable of beneficial occupation will not be included in an assessment to land tax, and therefore cannot be the subject of redemption. In the contracts in evidence in this case the parties could not have been contracting in respect of the highway, because, first, the surface being a public road was placed extra commercium and could not be in the occupation of anybody, and, secondly, the subsoil in its natural condition, which was its condition at the time of redemption, was of no value and was incapable of beneficial occupation: *Lambeth Overseers v. London County Council* (2); *Metropolitan Ry. Co. v. Fowler* (3); *Great Eastern Ry. Co. v. Hackney District Board of Works* (4); *Westminster Corporation v. Johnson* (5); *Winstanley v. North Manchester Overseers* (6); *Hare v. Putney Overseers*. (7) The presumption as to ad medium filum, upon which the respondents rely, has always been applied hitherto to cases of ownership or grant and is inapplicable to cases of assessment or redemption of land tax, which is primarily not a landlord's but a tenant's tax: *Rex v. Inhabitants of Mitcham* (8); *Rex v. Inhabitants of St. Lawrence, Winchester* (9); *Ward v. Const* (10); *Hackney and Lamberhurst Tithe Commutation Rent Charges*. (11) This view is supported by the reason for the presumption which, as shewn by the authorities, rests upon the absurdity of supposing, in the absence of expressed intention, that the grantor should have reserved to himself something which could be of no value to him, such as the moiety of a highway or the moiety of a river bed, but which might be directly and immediately useful to the grantee: *Lord v. Commissioners for the City of Sydney* (12); *Doe v. Pearsey* (13); *Dwyer v. Rich* (14). [They also referred on this point to *Mappin*

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| (1) (1894) 58 J. P. 446; Bourdin's Land Tax, 4th ed., p. 192. | (8) (1783) Cald. 276. |
| (2) [1897] A. C. 625, at p. 631. | (9) (1784) Cald. 379, at p. 384. |
| (3) [1893] A. C. 416, at p. 427. | (10) (1830) 10 B. & C. 635. |
| (4) (1883) 8 App. Cas. 687, at p. 693. | (11) (1858) E. B. & E. 1, at p. 47. |
| (5) [1904] 2 K. B. 737, at p. 748. | (12) (1859) 12 Moo. P. C. 473, at p. 498. |
| (6) [1910] A. C. 7, at p. 15. | (13) (1827) 7 B. & C. 304, at p. 307. |
| (7) (1881) 7 Q. B. D. 223, at p. 233. | (14) (1871) I. R. 6 C. L. 144, at pp. 149, 150. |

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Brothers v. Liberty & Co. (1); *Rex v. Inhabitants of Edmonton* (2); *Berridge v. Ward.* (3)] So in *Marquis of Salisbury v. Great Northern Ry. Co.* (4), where the presumption was rebutted by something outside the conveyance, the presumption was put upon the presumed intention of the grantor. But here the intention of the Commissioners must have been not to include the highway in the assessment because it had no value.

[They also referred to *Simpkin v. Robinson* (5); *Charleton v. Alway* (6); *Harrison v. Duke of Rutland* (7); *Newton, Chambers & Co., Ltd. v. Hall.* (8)]

Macmorran, K.C., and *Konstam*, for the respondents. The presumption that the owner of land abutting on a highway owns the soil of the highway *ad medium filum* is a presumption as to the ownership of the land, and its application to conveyances is to be accounted for by that fact; it applies to land of whatever tenure, whether freehold, copyhold, or leasehold, and it applies to streets in a town: *Doe v. Pearsey* (9); *Tilbury v. Silva* (10); *In re White's Charities.* (11) An owner who dedicates to the public a portion of his land as a highway parts only with a right of passage and may exercise all other rights not inconsistent with that dedication: *Vestry of St. Mary, Newington v. Jacobs* (12); *Rolls v. Vestry of St. George the Martyr, Southwark.* (13) In this case no question of vesting arises, because in the city of London the streets are not vested in the local authority. It is said that the soil of the highway could not have been included in the assessment to land tax because it was of no value, but in *Hodgson v. Pearson* (14) a similar argument was used with respect to the waste of a manor and was rejected by the Court. Although the soil of the road adds nothing to the value of the property, yet it is part of the property. The tax issues out of the entirety, not only out of the profitable part;

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| (1) [1903] 1 Ch. 118, at p. 128. | (7) [1893] 1 Q. B. 142. |
| (2) (1831) 1 Moo. & Rob. 24, at p. 32. | (8) [1907] 2 K. B. 446. |
| (3) (1861) 10 C. B. (N.S.) 400. | (9) 7 B. & C. 304. |
| (4) (1858) 5 C. B. (N.S.) 174. | (10) (1890) 45 Ch. D. 98. |
| (5) (1881) 45 L. T. 221. | (11) [1898] 1 Ch. 659. |
| (6) (1840) 11 Ad. & E. 993. | (12) (1871) L. R. 7 Q. B. 47. |
| | (13) (1880) 14 Ch. D. 785. |
| | (14) (1874) 31 L. T. 679. |

and if the soil of the highway was included in the assessment it was included in the contract for redemption, for the intention was to redeem the tax on the whole property. In *Westminster Corporation v. Johnson* (1) public lavatories constructed under the soil of a highway by a sanitary authority in pursuance of the Public Health (London) Act, 1891, were held assessable to land tax although no profit was derived from them. The presumption applies to a contract for redemption of land tax as much as to any other legal instrument relating to land. Such a contract is analogous to the release of a mortgage, as is recognized by the Legislature in the Finance Act, 1896, s. 33, which provides for the conversion of the public charge into a private charge. There is nothing either in the nature of the transaction or in these particular contracts which makes it impossible to apply the ordinary presumption.

Danckwerts, K.C., replied.

The House took time for consideration.

April 1. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal, dated July 24, 1911, varying an order of Swinfen Eady J., dated February 25, 1911, made upon a special case stated with the concurrence of the parties to a certain action for a declaration in order to submit the questions of law therein arising for the opinion of the Court.

The material facts found in the case are as follows.

The respondents, under the powers conferred upon them in that behalf by the various statutes mentioned in the special case, have constructed an underground railway under certain streets in the city of London running roughly from Staples Inn in Holborn to Cornhill. Neither the soil nor the surface of these streets is vested in any public authority. Numerous tenements and hereditaments with the houses erected thereon abut upon the streets through the subsoil of which the railway has been constructed. Each of these separate tenements has been charged under the provisions of three statutes, namely, 38 Geo. 3, c. 5, 38 Geo. 3, c. 60, and 42 Geo. 3, c. 116, with land tax amounting to certain sums.

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(1) [1904] 2 K. B. 737.

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In many instances the tax payable in respect of each separate set of premises was, before the construction of the railway, redeemed under the provisions of one of these statutes.

Three sets of premises have been selected as specimens, and the contracts under which the land tax payable in respect of them has been redeemed are attached to the special case.

No evidence was given to shew that the first two of these sets of premises were respectively acquired under any grant or conveyance. The first contract bears date February 3, 1804; the second December 7, 1867. The third contract is dated May 18, 1897, after the railway company had acquired under their statutory powers the premises with which it deals. The company are described in it as the freeholders, and the tax redeemed is that assessed for the year 1896-7.

Swinfen Eady J., in giving judgment on the several points raised in the case, expressed himself as follows:—"I therefore answer the special case by determining that the plaintiffs are not liable to pay land tax in respect of so much of their railway and works as is situate under any lands, tenements, or hereditaments which have been exonerated from the land tax before the construction of the railway, but that they are liable to pay land tax in respect of so much of their railway and works as is situate under any lands, tenements, or hereditaments not so exonerated; and that where the tax has been redeemed on lands and houses abutting on a public street or highway, the exoneration does not extend to the middle line of such street or highway."

The parties do not now, as I understand, quarrel with the decision of the learned judge on the first and second of these points, but merely with that upon the third.

It was in reference to his decision upon this last point that an appeal was taken to the Court of Appeal, and has been taken from the decision of that Court reversing it to your Lordships' House.

The case of the respondents on this point was, as set out in the special case, shortly this. They contended that the premises mentioned in the three contracts respectively abutting upon the public street extended presumably to the medium filum viæ;

that this was presumably their boundary, and that the land tax assessed upon each set of them must be taken to have been assessed on the entire of the premises including that portion under half the highway, and that when the tax was redeemed the entire premises were exonerated.

Swinfen Eady J. decided that this contention was not sustained. The Court of Appeal, by a majority, decided that it was sustained. The question for your Lordships to determine is which of these decisions is right. It was argued at some length, on behalf of the appellants, that the presumption that the boundary of a close or parcel of land abutting upon a highway or river is the medium flum of that highway or river was only applicable either to the construction of grants or conveyances of that close or land, or to fix the extent and limits of the ownership of a close or land so situated, that it had no application to the construction of a contract to redeem land tax, and that, accordingly, the land underlying half a roadway or river could not be held to be exonerated under such a contract unless this was specifically provided for in the contract.

My Lords, it appears to me that a fallacy underlies that reasoning. The presumption is had recourse to in such a case as this, I think, in order to fix and determine the true extent and limits of the close or tenement abutting on the public highway or river. If the contract of redemption sufficiently indicates that this close or tenement is assessed as a whole, a taxable unit, or separate entity, then when the tax so assessed is redeemed it must be taken that the entire of that entity, not the merely profitable part of it, is thenceforth exonerated.

The origin and history of this presumption were much discussed. These are, in my view, irrelevant topics.

It is well established that the presumption is applicable to cases where no grant or conveyance has to be construed: *Doc v. Pearsey* (1); *Vestry of St. Mary, Newington v. Jacobs*. (2) In *Harrison v. Duke of Rutland* (3) Kay L.J. states the rule succinctly, thus: "The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side is

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(1) 7 B. & C. 304.

(2) L R. 7 Q. B. 47.

(3) [1893] 1 Q. B. 142, at p. 155.

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the property of different owners, each is owner of the soil on his side ad medium filum of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions."

No doubt this presumption may be rebutted, either by the provisions of a grant or conveyance or by the surrounding circumstances. In *Ligh v. Jack* (1) it was rebutted by the fact that the street upon which lands abutted was at the date of the grant not actually made, but only intended by the grantor to be made. But unless and until rebutted it must prevail. Moreover, subject to the right of way, or easement of the public, as it is sometimes called, the soil and every incident of the ownership of it remains in the owner. He can maintain an action for trespass upon it against any member of the public who uses it for purposes not covered by that easement (*Harrison v. Duke of Rutland* (2)), and he can maintain ejectment to recover possession of any portion of it upon which any one has built a structure: *Goodtitle v. Alker*. (3) Lord Mansfield, when dealing with this question of ejectment, cited with approval the following passage from Rolle's Abridgment, B. pl. 1, 2: "That the King has nothing but the passage for himself and his people: but the freehold and all profits belong to the owner of the soil." And he proceeds to add: "So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it, by a writ of ad quod damnum." When a street or road is stopped up under 5 & 6 Will. 4, c. 50, s. 91, the same result follows: *Rolls v. Vestry of St. George the Martyr, Southwark*. (4)

The main argument of the appellants, however, was this, that land tax is under the 38 Geo. 3, c. 5 assessed on the "annual value" of the land, tenement, or hereditament, and as the soil under the highway was in these three instances of no annual

(1) (1879) 5 Ex. D. 264.

(2) [1893] 1 Q. B. 142.

(3) (1757) 1 Burr. 133, at p. 143.

(4) 14 Ch. D. 785.

value to the owner at the time of redemption of the tax, it could never have been assessed. Taken by itself and until it is used for some valuable purpose, such as having cellars or some such thing made in it, this land may be of no value, but it by no means follows that the annual value of the close or tenement of which it forms part may not be enhanced in value by the right and power which the owner of that close or tenement would have to utilize the subsoil of the roadway for some beneficial purpose. A dwelling-house with cellars built under the street in front of it is, presumably, more valuable than a house with none, and, equally, a house with soil under the roadway in front of it, in which the owner of the house can excavate and build cellars or some such works, is, presumably, more valuable than a house with no frontage of that kind. In this point of view the soil under the roadway has, when taken together with the other portions of the tenement of which it forms part, an annual value, and is assessed to land tax when those other portions of the tenement are assessed on the enhanced value it gives to them. During the argument I asked Sir Robert Finlay, who opened the appeal, if he contended that if a close which contained some utterly valueless land was assessed to land tax, under a description by which it could be readily identified, at a certain sum, and that tax was redeemed, a portion of the close which was valueless at the time of redemption could be assessed if it subsequently became valuable. He answered in the negative.

In other words, a tenement which is assessed as a whole, as a taxable unit, cannot be disintegrated, its valuable portions treated as assessed, and its valueless portions treated as not assessed. If that be so, as it is admitted it must be, then, in my view, the question for decision in this case resolves itself into this, Do these three contracts on their true construction indicate that the three sets of tenements or hereditaments with which they respectively deal were each assessed as taxable or assessable units? If they do, then when the tax to which the units were respectively assessed was redeemed the entire of each unit was thenceforth exonerated.

It does not appear to me that the Putney Bridge case (*Hare v.*

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Putney Overseers) (1), the Brockwell Park case (*Lambeth Overseers v. London County Council*) (2), and such like cases dealing with rateability for poor rate under 43 Eliz. c. 2, have any application to cases like the present. That statute provides that the poor rate is to be raised by taxation of "every occupier of lands, houses," &c. And it has been many times decided by this House that the "occupation" which renders the occupier liable to be rated must be a "beneficial occupation," a thing of value. Any occupation, however undoubted and well established, is inadequate if it is not of this character. And all that was decided in these cases was this: that the owners, the Metropolitan Board of Works in the one case and the London County Council in the other, were not in such beneficial occupation of the structures or land with which the cases were respectively conversant as to render them liable to be rated.

There is, however, no provision as to occupancy in the Land Tax Acts. It is clear from the wording of the 4th and 5th sections of 38 Geo. 3, c. 5, that all the lands, tenements, and hereditaments therein mentioned are charged with the land tax, and the tax is to fall under s. 4 upon those "having or holding" the same. The persons who so "have or hold" them are described in s. 5 as "the landlords, owners, and proprietors." And provision is made that such of these persons as do not receive for their own use the true yearly value of properties for which they are chargeable by a pound rate by reason of the fact that these properties are incumbered by rentcharges, annuities, or other annual payments issuing thereout, or fee farm rents, rent services, or other rents thereupon reserved or charged, shall be entitled to deduct a proportionate part of the rate from the person entitled to these rents or incumbrances. No doubt the tenants of lands and hereditaments assessed are by s. 17 authorized and required to pay the tax in the first instance, but they are entitled to deduct out of their rent so much of the rate as the landlord ought to pay and bear, and landlords both mediate and immediate are required to allow such deduction. In case any difference should arise between the landlord and tenant as to the amount to be deducted, the Commissioners are, by

(1) 7 Q. B. D. 223.

(2) [1897] A. C. 625.

s. 18, empowered to settle it. It was stated by Sir Robert Finlay that the practical rule adopted by these latter is that where the tenant holds at a rack rent he deducts the entire tax from his rent. The entire burden of the rate therefore falls upon the owners, not the occupiers, of the property assessed, and the amount of the burden is measured by the annual value of the property to that owner.

If the value be nominal, then, as was pointed out by Stirling L.J. in the case of *Westminster Corporation v. Johnson* (1), the property would not, in practice, be included in the assessment, and would in that sense, but only in that sense, cease to be assessable. That very case, however, shews that the owner may be assessable though, in fact, he receives no income from the hereditament assessed but rather holds it at a loss. The facts of the case were that the soil under the streets at Piccadilly Circus, Great Marlborough Street, and Broad Street was vested in the corporation, under the provisions of the Public Health (London) Act, 1891. They had constructed under these streets lavatories and sanitary conveniences for the use and benefit of the public. They had placed paid attendants in charge of each of them and had made some small charges for the use of the closets and lavatories. Those fees in the instance of Piccadilly met the expenses of management and maintenance, but in the other two it was otherwise, and, taking the whole together, they were a source of expense to the city and a burden on the city rates.

The corporation had, under the provisions of s. 45 of the Public Health Act, 1891, power to lease these conveniences for a term not exceeding three years at such a rent, and subject to such conditions as they might think fit, and could make such charges for their use as they might think proper, but such a demise should provide that the premises should be maintained for the purposes mentioned in this statute. It was held in the Court of Appeal by Collins and Stirling L.JJ. that the corporation had such a proprietary right in these conveniences as holders of lands, tenements, or hereditaments as rendered them liable to be assessed under the 38 Geo. 3, c. 5, s. 4.

(1) [1904] 2 K. B. 737, at p. 748.

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Now turning to the three contracts attached to the special case. It is shewn on the plan to which your Lordships have been referred that the tenements mentioned in the contracts all abut upon the public street. I take that to be the meaning of paragraph 4 of the special case. The owner of each of them is, therefore, in my view, presumably entitled to the soil under half the roadway opposite to his tenement. The middle line of the street is presumably the boundary of the tenement, and the house or messuage and the moiety of the road fronting it form but one tenement. That messuage or tenement is, in the case of the earliest contract, adequately described.

I do not think that, in the case of the Cheapside premises, either of these things is affected by the use of the words "occupation of Richard Clarke," and "occupation of John Perrell." These are, in my opinion, mere descriptions of the abutting premises. In the second contract two plots of ground abutting on to Newgate Street, formerly the sites of two "houses and premises," are described. For the same reason half the street opposite to them presumably forms part of them, and there is nothing to rebut that presumption in this instance or to shew that the street itself and not the middle thread of it was the true boundary of these plots. The description of them as No. 36 house and No. 37 house is, I think, inadequate for that purpose. In the last specimen contract the premises dealt with are described as two pieces of land formerly known as houses Nos. 85 and 86, Newgate Street and Nos. 21 and 22, King Edward Street, more particularly delineated in the plan annexed. On referring to the plan it will be seen that these pieces of land abut upon the two streets. As in the other case, so in this, I think that the medium filum viæ is presumably their boundary. I think that each of those several contracts must *prima facie* be taken to describe the whole of the tenement or hereditament mentioned in it, and that the burden rests upon the appellants to shew that the portion of each tenement under the roadway was treated as severed from the remainder of it and was not assessed to land tax. This burden is, in my view, certainly not discharged by the only fact relied upon for the purpose, namely, that the portion of tenement under half the

roadway would, if taken by itself and apart from the rest of the tenement of which it forms part, be of no yearly value. H. L. (E.)

I am of opinion, therefore, that the judgment of the Court of Appeal was right and should be affirmed and this appeal be dismissed with costs, and I move accordingly.

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LORD SHAW OF DUNFERMLINE. My Lords, the respondents are a company incorporated by the Central London Railway Act, 1891 (54 & 55 Vict. c. cxvi.). By that and a subsequent Act of 1892 (55 & 56 Vict. c. cxli.) they were empowered to construct railway and other works, partly within and partly beyond the area of the city of London. The question in this case has reference to land in and under which they have constructed a double tunnel or tube. This land is substantially under the line of certain well-known public streets in Holborn and thence eastward by way of Holborn Viaduct and Cheapside to the Bank.

Ex adverso of these streets there are, of course, very many separate tenements or parcels of land. In past years the land tax upon a large number of these has been redeemed. The transactions of redemption are not challenged.

But the Commissioners maintain the broad proposition that the redemption had no effect beyond the frontage of the tenements. These parcels were described and were in fact bounded by the streets. The streets themselves being accordingly beyond the stated boundaries of the properties, no land tax was ever levied thereon, no land tax thereon was ever redeemed and accordingly land tax upon the property occupied by the railway company can be levied now. Such is the contention.

Upon the other hand the respondents maintain that the ownership of the frontages on either side of the street extended *ad medium filum viæ*, just as, had the division or boundary between two subjects been a stream, the ownership of the riparian proprietors would have extended *ad medium filum fluminis*. And they accordingly contend that to hold that the solum of the street was impliedly excluded from the incidence of the land tax upon the frontagers' properties, or from the scope of the transactions under which this tax was redeemed, is not warranted by law. If that contention be correct, the respondents, who

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have acquired rights under the surface of the streets, are the successors of the ex adverso owners, and in all cases where redemption by such owners of the land tax upon their properties as a whole has taken place the respondents are entitled to the benefit of such exemption and to stand free of the tax.

I am of opinion that each of these propositions of the respondents is correct.

My Lords, I do not think that any advantage to the parties would be gained, nor would any elucidation of the true questions to be settled be secured, by a discussion of the question of whether this land tax falls upon owner or upon occupant. When the occupant primarily pays he may deduct the amount paid from his rent, while, on the other hand, a contract between owner and occupant on the subject is not excluded. No light falls upon the topic from an examination on economic grounds of the much disputed question upon whom the tax ultimately falls. The land tax is, by the terms of the leading Act, 38 Geo. 3, c. 5, s. 4, upon "all and every manors, messuages, lands and tenements," &c., within the enumerated counties, cities, boroughs, towns, &c., as set forth; and upon "all and every person and persons," &c., "having or holding" any such manors, messuages, or lands. The subsequent provisions as to primary payments, relief, and the like do not impinge upon the cardinal fact that the tax is upon all the lands themselves and upon all the persons having or holding the same.

It is admitted that in the cases in issue land tax was imposed and was redeemed. It is agreed that these lands abutted upon these London streets, and that in the imposition and in the transactions of redemption the properties were not divided or made the subject of separate treatment, but were in each case treated as one single subject. And accordingly the whole question in the case is what, in this transaction with regard to land tax, was the extent of the land, parcel, or property so treated? Did it or did it not include the land ad medium filum of the street by which it was bounded, or was the land between the frontage and the middle of the street impliedly excluded from the scope of the transaction for the redemption of land tax?

There is no question or point of an express agreement for exclusion. H. L. (E.)

With regard to properties bounded by a river or highway the law of ownership is settled:—

(1.) Such ownership is presumed to extend *ad medium filum*. The highway or the river may be the subject of rights of passage, or, say, the surface of the former may for public and municipal purposes be vested in public or municipal authority, and to this limited extent the rights of possession may be conditioned or restricted. When the road is shut up and definitely abandoned and the rights of passengers or public authority are definitely withdrawn the limitation flies off, and the unconditioned and unrestricted possession by the *ex adverso* owners may be resumed. I refer on this head to *Vestry of St. Mary, Newington v. Jacobs* (1) and *Rolls v. Vestry of St. George the Martyr, Southwark* (2).

(2.) This presumption of extent of the subject *ad medium filum* is applicable not in the case of freeholds alone but of copyholds and of leaseholds. Kay J. in *Tilbury v. Silva* (3) so expressed it in the case of a river boundary, but the same rule holds in the case of a boundary by highway.

(3.) The presumption applies to lands, &c., bounded by the streets of a town equally with ordinary roads or highways. In *re White's Charities* (4) Romer J. asks: "Why should towns be excluded? And if towns were excluded, where would you limit the exception from the rule? Would a country town be excepted? Would a small town? Would a village? Would a hamlet? Where are you to stop?" And he adds the general statement, with which I entirely agree: "It seems to me that unless there are certain circumstances connected with the particular town, the rule applies to streets in towns as it does to highways in the country."

(4.) The presumption operates not only in cases where the boundary is expressed to be by the highway or street, but also in the cases where the properties are delineated by plan or colour or measurement. I may refer to the opinion of Cotton L.J. in

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(1) L. R. 7 Q. B. 47.

(2) 14 Ch. D. 785.

(3) 45 Ch. D. 98.

(4) [1898] 1 Ch. 659, at p. 664.

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Micklethwait v. Newlay Bridge Co. (1) To this I may add the cases such as some of the present instances, where the properties are described as in the possession of persons named. In all such cases, if de facto the boundary is the highway or street, the presumption of extent ad medium filum applies.

(5.) There has been much discussion as to the reasons for, and the probable origin of, the doctrine. In some cases one reason may seem applicable and in other cases another; and probably the governing consideration may be found in general convenience. But this doctrine is not a mere inference of dedication; it is not a mere convenience in conveyancing; but it is, and is nothing less than, a presumption of, and applicable to, ownership itself. This is too deeply embedded in the law to be disturbed or doubted.

If these rules be kept in view the question arises why a transaction of redemption of land tax upon properties so situated should not extend to their entirety. The presumption of ownership is not rebutted with regard to the properties, each and all of which would accordingly have been a subject of conveyance on the footing of extending ad medium filum, although only a street boundary or the possession of tenant had been mentioned. What reason can be assigned for splitting up this property and holding that a part of it, namely, that under the one half of the street, had been detached in intention, or even in imagination, from the scope of the transaction? It is said that the land under the street was not beneficially occupied. There can be little doubt that with regard to the majority of properties in England it could be affirmed that there are portions or spots of them which looked at by themselves cannot be declared to be the subject of beneficial occupation, and that with regard to the strips of land over which roads run the same might be said. Yet the lands, messuages, and hereditaments of which this is true have been the subject of innumerable transactions dealing with each of them as a whole, including these spots, strips, or wastes. And it appears to me that these lands, &c., were meant all to be taken and each to be dealt with as a whole. I think that the expression used in the Land Tax

Act of 1798, namely, "all and every manors, messuages, lands, and tenements," was meant to be a comprehensive inclusion of all the lands within the enumerated counties, &c., which contributed the quotas of the tax, and that this inclusion was not subject to those gaps—it may be enormous gaps—which could not be declared to be, if taken separately and by themselves, beneficially occupied. I adopt the judgment on this topic of Stirling L.J. in *Westminster Corporation v. Johnson*. (1) The reply to the whole of the lengthy argument as to beneficial occupation is to be found in a single sentence of that learned judge, which I venture to repeat: "By the statute the tax is, in my opinion, made payable by reason of ownership, not by reason of occupation, and still less by reason of the nature of the occupation."

I am of opinion with your Lordships that the judgment of the majority of the Court of Appeal is correct and that the appeal fails.

LORD MOULTON. My Lords, I concur. The question raised by this appeal appears to me to be purely a question of construction, namely, what were the lands on which the land tax was redeemed by the payments referred to in the three certificates set out in Scheds. C, D, and E respectively? The appellants contend that those lands were bounded by the line of the frontage of the houses and plots mentioned in those certificates. The respondents, on the other hand, contend that they extended up to the middle of Cheapside and Newgate Street, which are the highways on which the houses and plots abut. The dispute, therefore, affects only the land beneath the streets between the above-mentioned frontage and the middle line of the street.

In the argument before the House many points were discussed, such, for instance, as the question whether the land tax should be considered a tenant's tax or a landlord's tax. I fail to see what relevancy such a matter has to the question for our decision. Two contentions, and two only, were in my opinion relevant to that question, and I shall confine myself to dealing with those two alone.

(1) [1904] 2 K. B. 737, at p. 748.

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In the first place the appellants contend that the area in dispute was incapable of being assessed to the land tax in the year when the redemption was effected, because it possessed no annual value at the time, and that, therefore, it was incapable of being included in any contract of redemption. In the second place they say that the lands in respect of which the land tax was redeemed are defined by the certificates, and that if properly construed those certificates do not purport to include the lands in dispute.

The first of these contentions is certainly a very extraordinary one. It is equivalent to saying that even if the certificates had, either by words or plans, specifically included the lands under the street, they would have had no operative effect with regard to those lands. Or, to put it in another form—if Blackacre be assessed to land tax and that land tax redeemed, so that the certificate of redemption admits, with regard to Blackacre, both the contract of redemption and its fulfilment by payment of the agreed consideration, it is still open to the Land Tax Commissioners to assess portions of Blackacre to the land tax if, in some future year, they can prove that at the date of redemption such portions were not economically productive. A certificate of redemption would, therefore, be no longer conclusive as to the area redeemed.

There is not a trace of authority for so extraordinary a proposition. To my mind the fallacy is evident. Whether Blackacre be under lease or in the hands of the freeholder the whole of it is liable to be assessed under 38 Geo. 3, c. 5, s. 4, and the persons having or holding it are bound to pay the proper sum in respect of the yearly profits of the hereditament. These yearly profits issue out of the whole of Blackacre, and the provisions for redemption provide for the redemption of the land out of which they issue. It is nihil ad rem to discuss whether any particular acre contributes to those yearly profits. It may well be that certain areas do not so contribute in a particular year, but that does not prevent their being a part of the entity out of which the yearly profits come. It is not, in my opinion, open to the Commissioners to exempt any land from assessment to the land tax (unless it has been previously redeemed) otherwise than in

the sense that the land tax will be nil if the whole of the tenement produces no yearly profit. I am therefore of opinion that if, on proper construction of the certificates (which are the true and only evidence of the land to which the redemption applies), the disputed lands are included in the redemption, the Court cannot subsequently inquire as to whether, at the date of the redemption, they substantially or at all contributed to the yearly profits by reference to which the quantum of the tax was then fixed. The certificate is conclusive that the land tax upon them was then redeemed, and it is settled law that if the land tax has once been redeemed no subsequent occurrences can render the lands liable to that tax in the future.

I turn, therefore, to the certificates. It is common ground that the descriptions of the parcels in the first and second certificates, and the description of the parcels in the third certificate, coupled with the plan annexed thereto, would, if they occurred in a lease, conveyance, mortgage, will, or other document connected with the transfer of property or creation of charges thereon, be construed as including the disputed land. And it is further admitted by counsel for the appellants that they can produce no case in which any different construction has been put upon descriptions or plans of the like kind in cases where (as is admitted to be the fact in the present case) the presumption existed that the owners of land abutting on the highway were in virtue thereof owners of the soil *usque ad medium filum viæ*. But they ask your Lordships to say that this rule of interpretation does not hold good in a certificate of redemption of land tax.

Speaking for myself, I should be most reluctant to initiate any such confusion in the legal interpretation of language. Consider for a moment its effect. Take, for example, the third certificate, which relates to lands acquired by the respondents for the purposes of their undertaking. The conveyance of the lands to the respondents would presumably describe the parcels conveyed in the exact terms used in the certificate and by reference to the plan therein appearing. At all events, if it did so describe them it is common ground that such description would be adequate to convey to them the disputed lands. The respondents then go to the Land Tax Commissioners and

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enfranchise parcels which they describe in exactly the same language and delineate in exactly the same plan as in the conveyance under which they acquired them. Your Lordships are asked to say that the lands so redeemed would differ from those conveyed in spite of the fact that they are described in identically the same terms, and although there is admittedly no authority in support of making such a difference in the interpretation in the two cases.

Lord Moulton.

Counsel for the appellants have sought to support their contention by an appeal to the reasons which they contend led to the above rule of interpretation in the case of conveyances, &c. These reasons do not seem to me to rest on any reliable authority or to be helpful in the present case. The question is what presumptions exist and not how they arose. It is settled law that the owners of lands abutting on a highway are presumed to own the land usque ad medium filum viæ, and that this presumption holds good in the present case. It is also admitted that in all legal documents transferring or affecting the property in such lands the corresponding lands under the road are presumed to go with the lands abutting thereon. These presumptions are sufficient to decide the case. But I may add that personally I am of opinion that the justification for the latter presumption is that it is extremely improbable that parties dealing with such lands would intend to differentiate in any way between the two pieces of land. The case may be put thus. Where a boundary of a parcel is a highway, that is to say, a strip of land of finite breadth and not a mere line, the question arises as to what is the true geometrical boundary of the land. The law cannot permit that the land under the highway should belong to nobody, and for some reason or other, which I will not inquire into, it has accepted the very reasonable presumption that the true boundary is the medium filum of the highway. Now it is extremely unlikely that parties would wish to separate the land bounded from that which I may call the bounding strip, and hence the law presumes that the parties intend them to go together. This reason applies with equal force whatever be the nature of the document which has to be interpreted. In my opinion the presumption as to the construction of

documents relating to lands abutting on a highway may be stated as follows: "Where a parcel is described or shewn on a plan as bounded by a highway it is presumed that it is intended that the parcel should go up to the actual boundary on that side, i.e. (under ordinary circumstances), *ad medium filum viæ*." In every case where parcels have had to be interpreted in a Court of law this presumption has hitherto been followed, and I can see no reason why it should not be followed in the present case.

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I am therefore of opinion that the decision of the majority of the Court of Appeal was right and that this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I should mention that Lord Halsbury agrees with the judgments that have been delivered in this case.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 1, 1913.

Solicitors for appellants: *Harratt & Pollock.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)* STUBBS, LIMITED APPELLANTS ;

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April 3. RUSSELL RESPONDENT.

*Libel—Innuendo—Newspaper—Trade Publication—List of Decrees in Absence
—Erroneous Entry—Imputation of Insolvency.*

In an action for libel brought by a tradesman in Scotland against the proprietors of a trade journal, known as *Stubbs' Weekly Gazette*, the defenders admitted that in a certain issue of their journal the pursuer's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the small debts courts, the fact being that the debt had been paid and the action dismissed. This list was headed by a note explaining that in no case did the publication of the decree imply inability to pay on the part of any one named. The pursuer averred that the entry falsely and calumniously represented that he was unable to pay his debts, and the Court approved an issue for the trial embodying this innuendo :—

Held, that the entry, when read in connection with the explanatory note, was incapable of bearing the defamatory meaning ascribed to it, and consequently that there was no question to go to the jury, and the issue ought to have been disallowed.

Crabbe & Robertson v. Stubbs, Ld. (1895) 22 R. 860, and *Hunter & Co. v. Stubbs, Ld.* (1903) 5 F. 920, considered.

Interlocutor of the Second Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland and an interlocutor of the Lord Ordinary in an action for libel, or slander as it is called in Scotland.

The appellants were the proprietors and publishers of a gazette known as *Stubbs' Weekly Gazette*. The respondent was a wholesale and retail furnisher and ironmonger carrying on business in Hamilton, Motherwell, and Wishaw. The action was raised by the respondent against the appellants for damages for an alleged slander published in their gazette.

This gazette was a commercial newspaper containing a variety of matters of interest to persons engaged in trade. It was

* *Present*: VISCOUNT HALDANE L.C., EARL OF HALSBURY (during the argument only), LORD KINNEAR, and LORD SHAW OF DUNFERMLINE.

supplied by the appellants to their subscribers and it had a wide circulation in England, Scotland, and Ireland. The gazette contained a special column devoted to the publication of the names and addresses of traders and others by and against whom decrees in absence had been taken. The respondent averred by his condescendence that this column was popularly known as the "Black List" and that the name of any trader appearing in that list was looked upon with grave suspicion as to solvency by all persons reading the gazette or knowing of its contents; that its object was to give information to tradesmen and the mercantile community generally as to bankrupts, insolvents, and defaulters in payment of their just debts and obligations.

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This column was headed as follows:—

"Extracts from the Court Books of Decrees in Absence in the Small Debt Courts. *Note*.—The following extracts from the Court Books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court Books. . . . We are willing at all times to insert any authentic information or explanation relative to decrees, or to correct any inaccuracy of record or otherwise."

In the issue of the gazette dated October 26, 1911, there appeared in this column the following entry referring to the respondent:—

| Court. | Date. | Pursuers. | Defenders. | Amount in Decree. |
|----------|--------------|---|---|-------------------|
| Hamilton | October 20th | British Electric
Detonator Co.,
Ltd., Liverpool | John Russell,
28 Quarry St.,
Hamilton | £9 19s. 6d. |

In point of fact the debt had been paid on October 12, and the action was dismissed, neither party appearing.

In the following issue of the gazette, dated November 2, 1911,

H. L. (SC.) the appellants explained that the entry was made in error and
 1913 tendered an apology to the respondent.

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The respondent averred that this entry falsely and calumniously represented that a decree in absence had been granted against him, and that he was unable to pay his debts and was in insolvent circumstances and in pecuniary embarrassment and was evading payment of a just debt. The appellants by their answer relied on the explanatory note at the head of the column and explained that the original entry made in the Court Register had been altered after it had been copied by the appellants by substituting for the letter "D," meaning decree, the word "dismissed." They further explained that during the period from February until October, 1911, the respondent had persistently refused or delayed to make payment of the just and lawful debts of his trade creditors, and they gave particulars. The appellants pleaded (*inter alia*) that the averments of the respondent being irrelevant the action should be dismissed, and, alternatively, they pleaded *veritas*.

In the Court of Session the action first depended before Lord Hunter, who approved an issue for the trial of the cause, which, after dealing with the question of publication, continued, "Whether the said statement in whole or in part is of and concerning the pursuer and falsely and calumniously represented that the pursuer was unable to pay his debts, to his loss, injury and damage?" And he disallowed the following counter-issue proposed by the appellants: "Whether the pursuer during the period from February until October, 1911, repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors?"

The appellants reclaimed to the Second Division against this interlocutor, but their Lordships unanimously refused the reclaiming note and adhered to the interlocutor.

1913. Feb. 10. *T. B. Morison, K.C.* (of the Scottish and also of the English Bar), and *H. A. McCardie*, for the appellants. The question is not whether it may not be a libel to publish an erroneous statement that a decree in absence has been made against a trader in respect of a particular debt, but whether the

statement which the appellants have published in this case can upon any reasonable interpretation of it be taken to imply that the respondent is unable to pay his debts. The issue approved by the Court ought to have been disallowed because the statement complained of is incapable of the innuendo contained in the issue. The entry refers to one particular debt only and is not a representation as to the respondent's means otherwise. Even assuming that the entry might if taken alone be capable of being construed as an imputation upon the respondent's solvency, that construction is negatived by the explanatory note accompanying the entry: *Searles v. Scarlett*. (1) *Hunter & Co. v. Stubbs, Ltd.* (2) is distinguishable from the present case, first, because, so far as appears, no objection had been taken by the defenders to the issue approved in that case, and, secondly, because the Court was not there concerned with the law as to the adjustment of the issue, but was considering whether a new trial should be ordered after the issue had been tried. *Crabbe & Robertson v. Stubbs, Ltd.* (3), assuming it to have been rightly decided, is also distinguishable, because the explanatory note then adopted by the defenders was less comprehensive than the note which is now used. It is not enough to say that the statement might be understood by some persons in a defamatory sense, for if a statement is capable of a number of good interpretations it is not reasonable to seize upon the only bad one in order to attribute a defamatory sense to it: *Capital and Counties Bank v. Henty* (4); *Nevill v. Fine Art and General Insurance Co.* (5) If the order of the Court of Session allowing the respondent's issue and disallowing the appellants' counter-issue stands the result will be to deprive the appellants of all defence to the action.

R. Munro, K.C., and *M. P. Fraser* (both of the Scottish Bar) (with them *J. Ian Macpherson*), for the respondent. In *Crabbe & Robertson v. Stubbs, Ltd.* (3) the terms of the issue were specifically before the Court in circumstances indistinguishable

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(1) [1892] 2 Q. B. 56.

(2) 5 F. 920.

(3) 22 R. 860.

(4) (1880) 5 C. P. D. 514, at
p. 541; (1882) 7 App. Cas. 741, at
p. 788.

(5) [1897] A. C. 68, at p. 73.

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from those of the present case. In *Hunter & Co. v. Stubbs, Ltd.* (1), although, like *Searles v. Scarlett* (2), it is not precisely in point, Lord M'Laren thought it a reasonable inference to draw that the publication of a debtor's name in the black list of *Stubbs' Gazette* was a representation that he was unable to pay his debts. *Reiss v. Perry* (3), where *Searles v. Scarlett* (2) was discussed, also supports the respondent's case. In considering whether a statement is capable of bearing a particular innuendo regard may be had to the character and purpose of the publication in which the statement appears.

[LORD SHAW OF DUNFERMLINE referred to *Sexton v. Ritchie & Co.* (4)]

T. B. Morison, K.C., replied.

The House took time for consideration.

April 3. LORD ATKINSON. The Lord Chancellor desires me to state that he has had the advantage of reading the judgments which have been prepared by Lord Kinnear and Lord Shaw and that he concurs in them.

LORD KINNEAR. My Lords, the question in this case is whether the Court below has done right in adjusting an issue for the trial of an action for libel, or whether they ought not to have refused to send the case to a jury and given judgment at once for the defenders. We have not the advantage of having any opinions of the learned judges before us. But from what was said at the Bar it may probably be inferred that they proceeded on the supposed authority of the case of *Crabbe & Robertson v. Stubbs, Ltd.* (5) I am of opinion that that case does not support the judgment. But, however that may be, it is not binding on this House; and before I examine it I think it will be convenient in the first place to consider the present question on its own merits, with reference to rules of law that are otherwise well settled.

The appellants, who are defenders in the action, are the

(1) 5 F. 920.

(2) [1893] 2 Q. B. 56.

(3) (1895) 11 Times L. R. 373.

(4) (1890) 17 R. 680; affirmed

[1891] W. N. 59.

(5) 22 R. 860.

proprietors and publishers of a newspaper called *Stubbs' Weekly Gazette*; and the pursuer avers that they carry on for profit a business which they describe in their advertisements and prospectuses as a means of enabling traders to avoid making bad debts. As Lord President Inglis observes in *Andrews v. Drummond & Graham* (1), with reference to a similar publication, "the object seems quite a legitimate one, and if prosecuted in a legal manner no one could object to it." But the pursuer's complaint is that the defenders have gone beyond what the law allows, to his injury, inasmuch as their gazette contains a list of persons against whom decrees in absence have been obtained; and in the issue of October 26, 1911, his name appeared in the list as a defender against whom a decree in absence for 9*l.* 19*s.* 6*d.* had been taken in the Sheriff's Small Debt Court at Hamilton, whereas, in fact, this statement was false, because the claim of debt to which it referred had been settled and the action had been dismissed.

It is admitted that the entry of the pursuer's name in the list was made in error. The validity of the excuse the appellants put forward for their mistake is not relevant to the present question. But I observe in passing that people who follow such a business as was undertaken by the appellants impose upon themselves a duty of care and circumspection, because they have taken the reputation and credit of their neighbours into their own hands, and it will be no answer to any well-grounded complaint of injury through misrepresentation of fact that they have misunderstood the import of entries in the Sheriff's Court books, or that the entries themselves were misleading. They undertake to say what passed in Court apparently by a study of what is recorded in the Sheriff's Court books and they take the risk of their own interpretation of the entries which they may not perfectly understand. But, as I say, that is not material to the present question, which is whether there should be a trial or not. All that is to the purpose to say upon this statement in defence at present is that the appellants cannot plead, as they might otherwise have done, that no action will lie for a mere statement made in a newspaper or elsewhere that a decree

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Lord Kinnear.

H. L. (SC.) has passed in a public Court of justice, because that is a public
 1913 fact which everybody is entitled to state. But no such plea of
 ~~~~~ justification is required, if the statement is not in itself libellous,  
 STUBBS, and I am of opinion that taken by itself it bears no defamatory  
 LIMITED meaning. To apply the approved definition of a libel, for which  
 v. RUSSELL. action will lie, it certainly does not hold the pursuer up to  
 Lord Kinnear. hatred, contempt, or ridicule, and just as little does it convey an  
 imputation injurious to him in his trade. An injurious inference  
 might no doubt have been drawn, if inability to pay a just debt  
 were the only reason which could account for a decree in absence  
 being allowed to pass in a small debt court. But, as the  
 appellants' counsel very forcibly pointed out, such a thing may  
 happen from a variety of causes that are perfectly consistent  
 with solvency and honest intention on the part of the debtor.  
 If this were all, the question would be whether a publication is  
 libellous because one out of various possible inferences from the  
 facts which it states may be injurious while others are harmless.  
 This question was answered in the negative by the decision of  
 this House in *Capital and Counties Bank v. Henty*. (1) But in  
 the present case it does not really arise. It is absolutely  
 excluded by the express language of the very statement of which  
 the pursuer complains.

The alleged ground of action is an entry in what he describes  
 as the defenders' black list. But the entry is a mere statement  
 of names, with a date and a sum of money; and what it is  
 intended to represent is explained in a head-note, which must  
 be read along with it in order to make it convey any intelligible  
 meaning. The head-note begins with a descriptive title of what  
 is to follow, to wit:—"Extracts from the Court Books of Decrees  
 in Absence in the Small Debts Courts," and to this there is  
 appended a note in the following terms:—"The following  
 extracts from the Court Books have been received since our last  
 issue. . . . It is probable that some of the decrees have been  
 sisted, settled, or paid; and in no case does publication of the  
 decree imply inability to pay on the part of any one named,  
 or anything more than the fact that the entry published

(1) 7 App. Cas. 741.

appeared in the Court Books." This appears to me to be conclusive of the whole question. It is impossible to say that this statement fairly read would convey to any reasonable mind the imputation on persons whose names are found in the list that they are unable to pay their just debts. The pursuer admits that he cannot put the bare entry in the list to a jury without an innuendo; and the only innuendo he proposes is embodied in the issue which has been allowed, and by which it is proposed to ask the jury "whether the said statement" (that of course refers to the statement in the appellants' newspaper which it is proposed to append in a schedule to the issue) "falsely and calumniously represented that the pursuer was unable to pay his debts." But that is the very thing that "the said statement" in the plainest and most explicit language declares that it does not represent.

It is said that, although the language of the statement taken by itself may be harmless, a libellous character may nevertheless be given to it by evidence of extrinsic facts relating to the purpose or circumstances of the publication. I agree, and if there were any relevant averments of such facts, I should think the pursuer should be allowed to prove them. But there is nothing stated on record which can alter the plain meaning of the document. If the purpose ascribed to the defenders were more suggestive than it is of an intention to defame by imputing insolvency, no inference of that kind could stand against the positive and explicit language in which it is repelled by the defenders. The question is, in reality, whether the defenders' statement means what it says, or whether it means the reverse of what it says, and I am of opinion that that is a question which should not be allowed to go to a jury.

The law is perfectly well settled. Before a question of libel or slander is submitted to a jury the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the Court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case. It is unnecessary to cite authorities, because they are many, but I take the doctrine as laid down by Lord

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H. L. (SC.) Selborne in *Capital and Counties Bank v. Henty* (1), where, after  
 1913 stating the general rule to the same effect as I have just stated  
 it, the learned Lord adds: "If the judge, taking into account  
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 LIMITED which are properly in evidence, is not satisfied that the words  
 v. are capable of the meaning ascribed to them, then it is not his  
 RUSSELL. duty to leave the question raised by the innuendo to the jury."  
 Lord Kinnear.

In a very recent case, *Smith v. Walker* (2), in the Court of Session, the Lord President pointed out that, in applying this doctrine, which his Lordship cited from Lord Selborne as I have just done, to the practice of Scotland, it is necessary to substitute for the words "facts properly in evidence" the words "properly averred on record." This is because in Scottish practice the question of libel or no libel, so far as it is a question for the Court only, is not left to be raised at the trial, but must be decided at the stage at which the interlocutor now under review has been pronounced. The Court cannot allow an issue in any case without deciding that there is a proper case to go to a jury and ascertaining the question of fact which the jury is to decide. In the present case, therefore, it is decided by a final judgment of the Court that the words complained of when taken in connection with the facts alleged on record are capable of the defamatory meaning ascribed to them; and the judge at the trial would have no power to withdraw the case from the jury on the ground that they will not bear that innuendo. I think it clear, in the first place, that the whole of the statement in the head-note, as I have quoted it, must be read in conjunction with the alleged excerpt from the Sheriff's Court books, and, secondly, that when it is so read it is impossible that any reasonable man should collect from it the libellous imputation alleged.

Taking this view of the law, I do not think that the Court need have been embarrassed by the case of *Crabbe & Robertson v. Stubbs, Ltd.* (3) It so far resembles the present that in an action against the present appellants it was held that a statement in their paper that a decree in absence had passed against a certain person when read along with the context, and in the

(1) 7 App. Cas. 741, at p. 744.

(2) 1912 S. C. 224.

(3) 22 R. 860.

circumstances there alleged, might support an issue in the same terms as that before us. But the facts alleged as to the avowed purpose of the publication were more suggestive of an intention to impute insolvency than anything stated in the present record; and, what is much more important, the perfectly explicit statement which I have quoted, and which seems to me to be the vital point in the appellants' case, was not to be found in the paper complained of in the case of *Crabbe & Robertson*. (1)

There was a statement as to the possible imputation of insolvency, but the Court did not read it as a clear disavowal of such imputation as regards all the persons whose names were found on the list, but only as an indication that some of them might have paid their debts or taken proceedings for avoiding the decree. It was therefore thought that the record presented a relevant case to go to a jury. I am bound to say that I think the case was a very narrow one, although I still remain of opinion that it was rightly decided. But the only general doctrine for which it can be cited as an authority is that which I have already had occasion to state, and which I take to be beyond dispute, that the purpose and circumstances of a publication may impart to language a meaning which it would not otherwise bear. Whether that doctrine was rightly applied or not in the particular case is a matter of no importance, because a decision as to the libellous or innocent character of particular words in particular circumstances cannot govern the construction of different words, however minute the difference may be.

The other case cited, *Hunter & Co. v. Stubbs, Ltd.* (2), is in a different position. The publication complained of seems to have been in terms which I cannot distinguish from those in the publication now complained of; and it follows from what I have said that, in my opinion, the issue ought not to have been granted in that case. But the only question reported arose after trial, when it was too late to question the issue; and it does not appear from the report on what ground it was allowed, or whether the point was contested. I cannot therefore regard the case as an authority upon this question one way or the other.

(1) 22 R. 860.

(2) 5 F. 920.

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H. L. (SC.) 1913 It was certainly not binding upon the Court below, and of course it is not binding upon this House.

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Lord Kinnear. I have only to add, that if the innuendo proposed cannot be allowed, I think it impossible that your Lordships should send the case back to the Court below, as was suggested, in order that some permissible innuendo may be discovered. This would, in my opinion, be inconsistent with all sound practice and with legal principle.

I cannot say that I see any other libellous suggestion in the publication complained of, if the pursuer's innuendo fails; and there are no extrinsic facts averred which would support any other. But I do not propose to put my judgment upon that ground. I make the observation in passing, but the true ground of judgment is to my mind that the pursuer must allege his own ground of action and must state on record all material facts which he is prepared to establish in support of it. If it cannot be sustained as he states it, it is not for the Court to discover some other ground which he has not found out for himself, or to require him to prove some injury which he has not averred.

On the whole matter I am of opinion that the interlocutors under review ought to be reversed.

LORD SHAW OF DUNFERMLINE. My Lords, the appellants are the proprietors and publishers of *Stubbs' Weekly Gazette*. This is a newspaper which they issue for profit, and which it is admitted has a large circulation among traders. It is considered to be of interest and advantage to these traders to find in this paper what upon application they could have ascertained for themselves as registered public facts, namely, the decrees in absence pronounced in the small debt courts of Scotland. No question is raised as to the right of the appellants to publish this record.

Upon the other hand, it is also, as it must be, conceded that while this is the appellants' right, it is also their duty to make their publication of these decrees accurate in fact. If for any reason they fail in this duty, and if thereby a trader against whom no decree in absence has in fact passed is erroneously entered in that list, the appellants must stand responsible for

any injurious consequences which the erroneous entry has produced or would be reasonably likely to produce, taking into account its terms and the circumstances upon the one hand of the trader and upon the other of the publication. I did not gather that the appellants disputed this proposition. It has been the basis of many decisions both in Scotland and in England, and I do not desire in the judgment which follows to throw doubt upon it. It lies, however, with the pursuer to make a relevant averment of such injurious consequences, and the burden rests upon him of establishing them as the effects of the erroneous publication.

The rights and obligations of parties being thus granted, it must also, I think, be admitted that an erroneous statement that a decree had been passed for a small debt in Scotland would not necessarily import harm to anybody. In order to enable it to be treated as a harmful publication, an innuendo must be placed upon the erroneous entry shewing that the character or business of the trader has been injuriously affected because the readers or the public were led to conclude as against him something much more serious.

For, my Lords, such a decree might pass for a large variety of reasons, none of which would injuriously affect the reputation or trade of the debtor. One quite natural interpretation of the entry would be that the alleged debtor had forgotten to pay the small sum sued for. Another reason might be that he was—having certain opinions as to the injustice of the claim or the full amount of it—determined not to pay except under force of law. A third reason for such a decree might be that he was absent and knew nothing about the summons. And a fourth that he was a person given to refusing or delaying to pay his debts in ordinary and proper course. This last, my Lords, might possibly affect the reputation and credit of the alleged debtor. And I am not prepared to say that there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would not be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a Court, might always have met his obligations with regularity, might be in a

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 1913 present advised, I should not say that it was a strained construc-  
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 LIMITED that he was given to or had begun the practice of refusing or  
 v. delaying to make payment of his debts and that the public or  
 RUSSELL. those dealing with him had understood it in that sense.

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The position taken up by the respondent, the pursuer in the action, however, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry "falsely and calumniously represented that the pursuer was unable to pay his debts." He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for 9*l.* odd was equivalent to or implied an imputation of his insolvency.

After much consideration, I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear. For I think the test in these cases is this: Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies—and very often greatly varies—with his temperament or his disposition, in which the elements, on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed.

My Lords, there are circumstances, to which I am about to allude, which bring very vividly before the mind the mischief to which I have referred. But before I mention them I desire to add that it appears to me that the statements which I have made are amply supported by authority. The general rule, indeed,

occurs by way of statement in a single sentence of Brett L.J. in *Henty's Case* (1): "It seems to me," said that very learned judge, "unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document." In the same case in the House of Lords (2) Lord Selborne enunciated the familiar proposition that the words must be "taken in their natural sense." I refer to *Henty* (1) on account of its high authority. It was twice argued in this House and was the subject of careful and elaborate judgments. On this question of the meaning attributable to words no dissent in the judgments of the majority is expressed from the general proposition just quoted from Brett L.J. Indeed, I am not sure that in particular the judgment of Lord Blackburn (3) does not go further, for he states the principle on which the Court is to proceed in this language, "viz., that unless the plaintiff has so far satisfied the onus which lies on him to show it to be a libel that the Court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say"; and in another passage he refers to this onus which is upon plaintiff thus, "that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation." Lord Watson (4) used language of a less pronounced but still broad and emphatic character when he says, "If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular"; and Lord Bramwell (5) puts the hypothesis, "If a libellous inference may be drawn from them as a necessary or natural consequence, they are libellous." Out of this variety of expressions I have ventured to gather up what I think to be the result, namely, that the innuendo must represent what is a reasonable, natural, or necessary inference from the words used, regard being had to the occasion and the circumstances of their publication.

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(1) 5 C. P. D. 514, at p. 541.

(3) 7 App. Cas. at pp. 782, 785.

(2) 7 App. Cas. 741, at p. 746.

(4) 7 App. Cas. at p. 788.

(5) 7 App. Cas. at p. 790.



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By the laws both of England and of Scotland the duty of saying whether this inference may be made lies with the Court. The difference of procedure between the two countries is this, that in England the whole inquiry may be taken and the jury may have passed its verdict, before this essential and truly preliminary question is determined. If the verdict be for the defendant, then, of course, that is an end of the matter; but if the verdict be for the plaintiff, it is open—after, it may be, a very lengthy procedure—to the defendant to maintain that the inference made by the jury in favour of the plaintiff was one which the language employed will not bear. If the Court affirms that proposition, then judgment is entered for the defendant.

In Scotland the inquiry as to the reasonable, natural, or necessary interpretation of the libellous words is not entered upon at a stage so late. It is for the pursuer of an action to state definitely the meaning which he alleges the article or words complained of to bear, and to put that meaning in issue; and thereafter the Court determines whether there is any issuable matter and approves or disapproves, or it may vary or adjust, the issues proposed for the trial. But the principles upon which the Court proceeds in Scotland at the early stage are identical with those which the Courts in England proceed upon at the later stage in reference to the point now under discussion.

What happened in the present case was this. The pursuer stated the entry, and alleged that it was false that there was such a decree in absence. This was admitted. He then proponed the issue whether the statement was of and concerning him, and “falsely and calumniously represented that the pursuer was unable to pay his debts.” The defenders in their record founded upon the following heading which was, in the issue of their paper complained of, prefixed to the list of decrees in absence which they gave. That was in these terms: “Note.—The following extracts from the Court Books have been received since our last issue made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid, and in no case does publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court

Books." For some reason which has not appeared, the pursuer was allowed to present his issue with a schedule confined to the erroneous entry, but without any mention of this note. Such a proceeding cannot be defended. It was corrected by the Inner House in the case of *Crabbe & Robertson v. Stubbs, Ltd.* (1) It appears to me quite clear that the omission of this note from the schedule must have been inadvertent.

The defenders admit the error, explain how they had been led into it, and quote the apology made to the pursuer in their next week's issue. But they then proceed to give a list of eleven cases, extending over six months prior to the alleged slander, in which the pursuer had figured in the Court lists, and with regard to which they say that the pursuer's creditors "were unable to obtain payment from him of the sums due at their due date, notwithstanding repeated remonstrances, and only obtained payment after actions had been raised in the Sheriff Courts of Lanarkshire, and in some cases after decrees had been pronounced." They also accordingly proposed a counter-issue "whether the pursuer, during the period from February until October, 1911, repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors."

The importance of the shape of the pursuer's issue, and in particular of its innuendo, thus becomes apparent. For while the pursuer's issue with its sweeping innuendo has been allowed, the counter-issue of the defenders—that the pursuer repeatedly refused or delayed to make payment of his debts—has been disallowed by both Houses of the Court of Session. This has been done presumably upon the familiar ground that the counter-issue does not meet the entire breadth of the innuendo which the pursuer had put in his issue, namely, that he was unable to pay his debts. In short, the defenders were disabled from tendering proof that the pursuer for eight months before the entry founded on repeatedly refused or delayed to make payment of his just debts because he might have done all that, although he was not insolvent, and the pursuer had so framed his issue as to make the erroneous entry of one decree in absence impute insolvency in general terms.

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H. L. (SC.) My Lords, it is plain to my mind that this was paving the way for a complete miscarriage of justice.

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But that miscarriage arose, or would have arisen, simply because, in my humble judgment, the Courts below had permitted the imputation of insolvency to be put forward as a reasonable, natural, or necessary inference from a statement that a decree in absence had been taken for a sum of between 9*l.* and 10*l.* I do not refer to the note, which specifically stated that nothing was meant to be inferred except that a decree had been taken. It may be true that in a weekly gazette of this character a note so inserted might not obliterate the evil effect of the erroneous entry; but it does not appear to me to be justifiable to infer an imputation of insolvency from a single decree in absence for a small amount. Had the far less strained interpretation been put upon the words that the entry meant that this trader was a person who was refusing or delaying to pay his just debts, this would have enabled the whole facts under both the issue and the counter-issue to go before the jury, because it was exactly that not unreasonable interpretation which the defenders were willing to meet, and if they had established their averments and their counter-issue, they would, of course, have been entitled to a verdict.

It would, my Lords, be productive of wrong if the over-straining of an innuendo were in such a manner and by a finesse of procedure to be permitted to block out the real substance of a case; a verdict for the pursuer in such a situation would be obtained because the jury had been left compulsorily in the dark. I am aware of the answer made, that the debtor's bad record could be looked at for the purpose of mitigating damages and that the jury might grope towards the real truth on the whole case by the light thus let in upon one point as through a chink in the shutter. This again is a finesse of procedure; its use beyond the one point is illegitimate as all parties know. In the case in hand any exclusion of the whole light on the whole case would, in my opinion, be productive of possible mischance and contrary to law.

These considerations, my Lords, illustrate the necessity of confining innuendoes upon, and inferences from, words which in

themselves are not libellous within an area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed. The present case shews that, if that rule were to be departed from, it would enable pursuers, first, to strain by inference the meaning of words, and then, secondly, to prevent a complete answer to an issue being made by a defender, who might be thoroughly furnished in his defence against the inference which was the reasonable and natural one.

I am aware, my Lords, that in the case of *Hunter & Co. v. Stubbs, Ltd.* (1), and also in that of *Crabbe & Robertson v. Stubbs, Ltd.* (2), to which I have referred, the form of issue now to be declared by this House improper was allowed. In *Hunter's Case* (1), however, the defender had agreed to the issue and the question was not raised at the proper stage. *Crabbe & Robertson's Case* (2) has been dealt with fully by my noble and learned friend Lord Kinnear, and I agree with his Lordship's observations thereon and with the course which he suggests should be pursued.

*Interlocutors appealed from reversed. The respondent to pay the costs in the Courts below and of the appeal to this House.*

*Lords' Journals, April 3, 1913.*

Agents for appellants: *M'Kenna & Co., for George F. Welsh, Solicitor, Edinburgh.*

Agents for respondent: *Hamblins, Grammer & Hamblins, for Erskine Dods & Rhind, S.S.C., Edinburgh.*

(1) 5 F. 920.

(2) 22 R. 860.

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[HOUSE OF LORDS.]

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April 3.

GLASGOW AND SOUTH WESTERN RAIL-  
WAY COMPANY . . . . .

AND

BOYD & FORREST . . . . .

APPELLANTS;  
RESPONDENTS.

*Fraud—Contract induced by Fraudulent Misrepresentation.*

Interlocutor of the Second Division of the Court of Session in Scotland  
(1911 S. C. 33) reversed on the facts.

IN 1900 the respondents, the pursuers, entered into a contract with the appellants, the defenders, for the construction of a branch railway known as the Dalry and North Johnstone Railway. The work was completed and the respondents were paid the full contract price together with a further sum for extras, bringing up the total to 272,030*l.* The respondents thereafter raised an action against the appellants and concluded for payment of an additional sum of 106,688*l.* odd. The main grounds of the action were set out in the respondents' third plea in law as follows :—

“The contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon the pursuers, in respect (a) that said contract was induced by the fraud of the defenders, (b) that said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders, (c) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract, (d) that said contract was by agreement of parties departed from as the basis of charge, and (e) that the defenders are by their actions barred from founding on said contract as the basis of charge.”

The respondents maintained that they were induced to enter into the contract by the fraudulent misrepresentation of the

\* *Present*: EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE. LORD MACNAGHTEN took part in the delivery of their Lordships' opinions but died before the final settlement of the terms of the judgment.

appellants' engineer as to the nature of the work, and particularly as to the nature of the strata through which the line passed, and that consequently they were entitled to be relieved from their contract and to be paid upon the basis of a quantum meruit.

On January 20, 1910, the Lord Ordinary found that the charge of fraudulent misrepresentation was proved and affirmed the respondents' right to recover, but left for ascertainment the amount of the sum to which the respondents were entitled. On November 10, 1910, the Second Division of the Court of Session adhered to this interlocutor subject to a slight modification.

The appellants appealed against these interlocutors and also against two further interlocutors as to expenses.

Upon the appeal to this House the parties by their counsel agreed that the arguments should be confined to the issue of fraud raised by the respondents' third plea in law without prejudice to any other issue raised by that plea.

1912. March 4, 5, 7, 8. *Buckmaster, K.C.*, and *H. P. Macmillan* (the latter of the Scottish Bar, now K.C.), for the appellants.

*Clyde, K.C.*, and *A. M. MacRobert* (both of the Scottish Bar), for the respondents.

1912. May 16. Their Lordships, after consideration, delivered their opinions, to the effect that the evidence disclosed no case of fraud against the appellants, but postponed the further consideration of the appeal in order that the form of the judgment might be determined.

On April 3, 1913, the House reversed the interlocutors appealed from and made the following order:—

*Reverse the interlocutors appealed from: Find and declare that the respondents have failed to prove that they were induced to enter into the contract mentioned in the said interlocutor of the 20th day of January, 1910, by the fraud of the appellants or of any one for whom they are responsible: Remit back the cause to the Court*

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*of Session in Scotland with directions (1.) to repel branch (a) of the respondents' third plea in law; (2.) to repel branches (b) and (c) of the said plea in law, in so far as the same are founded or maintained on allegations of fraud against the appellants; and (3.) to hear and dispose of the whole pleas and contentions of the parties, except in so far as repelled in terms of the foregoing directions, and to do in the cause as shall be just and consistent with these declarations, findings and directions and this judgment: The respondents to pay the costs of the action in the Court of Session, so far as the same relate or are incident to the issues raised on the allegations of fraud against the appellants contained in the respondents' third plea in law, quoad ultra the said costs being reserved and to be disposed of as costs in the action, and also the costs of the appeal to this House.*

*Lords' Journals, April 3, 1913.*

Agents for appellants: *Sherwood & Co., Parliamentary Agents, for John C. Brodie & Sons, W.S., Edinburgh.*

Agents for respondents: *Balfour Allan & North, for MacRobert, Son & Hutchison, Solicitors, Glasgow, and Pringle & Clay, W.S., Edinburgh.*

## [HOUSE OF LORDS.]

COSTELLO (PAUPER) . . . . . APPELLANT ; H. L. (E.)\*  
 AND  
 OWNERS OF SHIP PIGEON . . . . . RESPONDENTS. 1913  
June 13.

*Employer and Workman—Compensation—Workman—Fisherman—Share of Profits—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7, sub-s. 2.*

A claimant under the Workmen's Compensation Act, 1906, was employed as boatswain on a steam fishing trawler and was remunerated by wages, maintenance, and poundage dependent on the profits of the fishing expedition:—

*Held* by Earl of Halsbury, Lord Mersey, and Lord Parker of Waddington (Earl Loreburn and Lord Atkinson dissenting), that he was remunerated by a share in the profits within the meaning of s. 7, sub-s. 2, of the Act, and was therefore excluded from the Act and not entitled to compensation.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (1) setting aside an award made by the deputy county court judge of Kingston-upon-Hull as arbitrator under the Workmen's Compensation Act.

The appellant, whilst employed as a boatswain of the respondents' steam fishing trawler *Pigeon*, sustained an injury by accident to his hand for which he claimed compensation.

The respondents disputed the claim on the ground that the appellant was not a workman within the meaning of the Act inasmuch as he was a member of the crew of a fishing vessel remunerated by a share in the profits of the working of the vessel within s. 7, sub-s. 2.

By an agreement in writing the appellant signed on for a fishing expedition in the *Pigeon* on December 18, 1911. By this agreement the skipper, with the consent and on behalf of the owner, agreed to pay to the crew "as wages and remuneration the sums and/or the share in the profits of the said fishing expedition against their names respectively expressed" and to

\* *Present*: EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, LORD MERSEY, and LORD PARKER OF WADDINGTON.

(1) Not reported.



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supply them with provisions. The agreement further provided that the fish caught by the fishing boat and her crew should be sold and the net amount arising from such sale, after deducting all usual customary and necessary expenses, divided into 14 parts or shares, of which  $11\frac{5}{8}$  shares should be for the owner of the boat and  $2\frac{3}{8}$  shares should be for the crew, which last-mentioned shares should be subdivided amongst the crew in the proportions set forth opposite to their respective names in the agreement. It was also agreed that the settlement of all shares of fishing profits should be made within seven days after the boat's return to port, and that, one day at least before settlement, a full account of fish taken, and of the amount for which it had been sold and full charges and deductions to be made from such amount or from such shares or any of them, should be rendered to each member of the crew who was to be remunerated wholly or partly by share. There was also annexed to the agreement a schedule containing the names of the crew and the rates of their remuneration.

Under the terms of this agreement the  $2\frac{3}{8}$  shares allotted to the crew were subdivided as follows:  $1\frac{3}{8}$  shares to the skipper, and 1 share to the mate; and the respondents paid certain sums of money known as "poundage" to the deck hands according to an agreed rate. The appellant was entitled to receive from the respondents fixed wages of 1*l.* a week, together with sleeping room, provisions, and certain small perquisites, and also poundage at the rate of 3*d.* in the pound based upon the net profits of the voyage. The voyage in the course of which the accident happened lasted twenty-four days and the poundage received by the appellant amounted to 1*l.* 4*s.* 3*d.*

The appellant did not receive any account of the profits as provided by the agreement.

Upon these facts the deputy county court judge held that the poundage did not constitute a share in the profits within s. 7, sub-s. 2, of the Workmen's Compensation Act, and he made an award in favour of the appellant. The Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.) set aside this award on the authority of *Admiral Fishing Co. v. Robinson*. (1)

This appeal was twice argued, first on April 30, 1913 (before

Earl Loreburn, Lord Atkinson, and Lord Parker of Waddington), and secondly on June 13. H. L. (E.)

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*Greer, K.C.*, and *Addington Willis*, for the appellant. The question is whether the contract of service gave the appellant a right to a share in the profits within s. 7, sub-s. 2, of the Workmen's Compensation Act or merely gave him a contractual right to a sum which is measured by profits. This sub-section was intended to exclude from the benefits of the Act co-adventurers in a fishing expedition, such as the captain and the mate in this case, but was not intended to exclude workmen who were paid regular wages but were earning a further sum dependent on profits. It was inserted to remove any doubt which might otherwise have existed as to the definition of "workman" in s. 13. The test in that section is whether a man has entered into a contract of service with an employer, not whether he is remunerated by a share in the profits, and, but for s. 7, sub-s. 2, it might have been contended that the master and mate of this vessel were included in the Act because, although they were paid by a share in the profits, they were working under the orders of an employer. All the profits are divided between the owner and the master and the mate before the appellant gets anything, but then one of the co-adventurers, namely, the owner, gives this man something out of the profits he has received. That is a share in the profits in the sense in which a commission may be called a share in the profits, but not otherwise. It would not give the appellant any claim in law or in equity against the partners to the proceeds of the sale of the fish.

[LORD PARKER OF WADDINGTON. I think he would be entitled to get a receiver in Chancery.]

Assuming that to be so, that does not conclude the question. The relations between the appellant and the owner were purely contractual, and he was not paid by a share in the profits at all. But assuming that to the extent of this small poundage he is to be treated as remunerated by a share in the profits, this man is not within the class aimed at in this sub-section. A fishing crew consists, or may consist, of three classes of men, (1.) men remunerated by wages, (2.) men remunerated by profits, and (3.) men

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remunerated by wages and profits. It is only class 2 which the sub-section intends to exclude from the Act. In *Gill v. Aberdeen Steam Trawling and Fishing Co.* (1) the claimant was precluded from claiming compensation because he was in the same position as the mate in this case, and the question was really unarguable. So in *Admiral Fishing Co. v. Robinson* (2), by which the Court of Appeal thought themselves bound, the claimant was paid by a share in the profits with a guarantee from the owner that his share should not fall below a certain minimum. That case was distinguished in *Woolfe v. Colquhoun* (3), which is on all fours with the present case except that it turned upon "gross earnings" instead of upon "a share in the profits." The Court there took the view that in order to see whether the sub-section applies you must ascertain what is the man's true and substantial remuneration, and if he is in substance a wage-earning servant he is not within the sub-section. In construing this Act regard ought to be had to its primary object, which was to confer privileges on workmen, and it ought to be construed liberally in favour of the persons whom it was intended to benefit. The language of the sub-section ought not to be stretched so as to extend the exception. In effect the Court of Appeal has inserted into the sub-section the word "partly." If the man in the street were asked whether the appellant belonged to the wage-earning or to the profit-sharing class of workmen there could be no doubt as to his answer. The word "remuneration" or "remunerated" is used in three places in the Act in reference to workmen—in s. 7, sub-s. 2, in s. 13, and in paragraph 2 (a) of the First Schedule—and it has been held by the majority of the Court of Appeal in *Skailles v. Blue Anchor Line, Ltd.* (4) that the word has the same meaning in s. 13 as in paragraph 2 (a) of the schedule, and means the aggregate amount which the workman receives. There is no reason why it should have any different meaning in this sub-section. Therefore it must mean "wholly" or "totally" remunerated in accordance with the interpretation put upon it by the Court. The onus of bringing the appellant within the exception in the sub-section is on the respondents, and they have failed to discharge that onus.

(1) 1908 S. C. 328; 1 B. W. C. C. 274.

(2) [1910] 1 K. B. 540.

(3) (1912) 49 S. L. R. 911.

(4) [1911] 1 K. B. 360.

*Sankey, K.C., and Alexander Neilson*, for the respondents. The remuneration of the appellant consisted of three things, wages, a share in the profits, and maintenance, and it is impossible to say that, because he is also remunerated by something else, he is not remunerated by a share in the profits. In *Gill v. Aberdeen Steam Trawling and Fishing Co.* (1) Lord Ardwall, upon the general construction of s. 7, sub-s. 2, expresses the opinion that it was intended to cover all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed. In *Woolfe v. Colquhoun* (2) the ratio decidendi proceeded upon an entire misconception in making the test whether a substantial part of the remuneration was or was not derived from a share in the profits. The result of that decision would be to make the question whether a man was or was not excluded from the Act depend upon the amount of the takings of the fishing expedition. Lord Dundas, who differed, says: "If one reads the language of the sub-section without addition or qualification, and asks whether or not the respondent" (who was in the same position as the appellant in this case) "was 'remunerated by a share in the profits or the gross earnings of the working of the vessel,' the only possible answer seems to me to be an affirmative one. If a different conclusion is to be reached, one must, I think, read into the sub-section some such word as either 'solely,' or 'principally,' 'mainly,' or the like." That passage expresses the respondents' contention. Similar language is used by the Court of Appeal in *Admiral Fishing Co. v. Robinson*. (3) [They also referred to *Reg. v. Postmaster-General* (4) as to the meaning of "remuneration."]

*Addington Willis* replied.

EARL OF HALSBURY. My Lords, there is no doubt that this is a very small point, but although it is a small point it is a very important one. I confess that I am very clearly of opinion myself that the judgment of the Court of Appeal was right. At the same time when I find a difference of opinion I wish to speak with

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(1) 1 B. W. C. C. 274, at p. 282.

(2) 49 S. L. R. 911.

(3) [1910] 1 K. B. 540.

(4) (1876) 1 Q. B. D. 658, at p. 663.



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all respect of those who differ from me. This matter, it is very obvious, has occupied the attention of a great number of learned persons, among whom there has been up to the present time a difference of opinion, and I regret to find, now that it has come to the final Court of Appeal, that there is still a difference among us.

My Lords, the whole point has been stated over and over again in argument, and the question is what is the meaning of the language as it stands. I think the true mode of construing the statute is to look simply at the words as they stand unless there is something in the facts which gives them a different meaning from their ordinary meaning. To my mind the enactment is intended to draw a distinction between different classes of persons who are actually engaged in the particular labour which is the subject-matter, and I think I could paraphrase what is intended by the Legislature by putting it in this form. There are a certain number of men who are in the ordinary sense servants; they are persons who engage for wages at a particular rate, and the Act is intended to give workmen certain rights to compensation. But it was, I should have thought, probably argued in Parliament, and it would probably be the meaning which was intended to be enacted by the language used, that for a variety of reasons a distinction ought to be drawn between what I will call the ordinary workmen and the shareholding workmen who become co-adventurers, or, as one of the Scotch judges said, partners in the concern. It is obvious, I think, that the Legislature would strive to draw a distinction between persons of the former class and persons who are in the nature of employers or partners in the joint adventure and to say that those co-adventurers should not claim the rights of the mere workman; and they have accordingly used the phrase that is now in debate. To my mind, if you read the words literally it is impossible to say that this man Costello was not remunerated by a share. It may be that it was not his whole remuneration; it may well be that when you are looking to another entirely different region of inquiry, namely, what is he to receive as compensation for any injury received during the course of his employment, you would give the word "remuneration" the meaning of everything he received. But when you

are drawing a distinction between two sets of workmen, one of whom should be only wage-earners and the other should be persons who are co-adventurers, the word "remuneration" would probably receive and ought to receive a different meaning; and it is made quite susceptible of a different meaning by the circumstances under which and the purpose for which you use the word.

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My Lords, I am not much impressed by the question what the man in the street would say if he were asked whether his remuneration was of such a character or no. The man in the street by hypothesis is not dealing with such questions as are now vexing us in construing this Act of Parliament. He would say the meaning was, what the man got by his work. But the question is whether the Legislature, which is contemplating different classes of workmen, is to be treated as the man in the street, who has only one dominant idea in his mind. What the answer to the question is to be must depend upon the hypothesis upon which you put it, and what sort of matter is being discussed when the question is put. For my own part I read the words simply as they are, and I think the natural and ordinary meaning of the words is that which the Court of Appeal have adopted. I move your Lordships accordingly that this appeal be dismissed.

EARL LOREBURN. My Lords, I have, I need hardly say, the greatest diffidence when I differ from my noble and learned friend and from others of your Lordships and from the Court of Appeal; but I have not changed my mind since this case was first heard, although I have listened with the greatest attention and with the desire to be convinced by the argument which has been addressed to your Lordships. I think the learned junior for the appellant, who made an admirable contribution to this subject, was right when he pointed out that this is a remedial Act and that we ought not to read into it an exception without bearing in mind the nature of the remedy which is proposed by the Act itself. This Act includes fishermen among those who are to receive its benefits, but with the exception of such members of the crew as are remunerated by shares in the

H. L. (E.) profits; and your Lordships have to say whether the appellant is within that exception. This man was employed on a fishing boat as boatswain, and he and all the other men on board slept in bunks. This seems to me to have no bearing on the question how they were remunerated, being merely a necessary convenience for every man on board. In point of pay or return for their services they were not all on the same footing; some received a share of the profits and nothing more; another class received wages with or without some little perquisites and their food; the appellant received his wages of 1*l.* a week together with a small share of profits and his food with other little perquisites. These distinctions in the way of rewarding men for their services may or may not be common. Parliament must be supposed to know, what is very obvious, that some men might be paid wholly by a share of the profits, others by mixed profits and wages and perquisites and food, and others by wages and food and perquisites not amounting to a share of the profits; and Parliament must be supposed to have passed this law with the knowledge that there might be these or other varieties. Reading this Act in its plain and popular sense, as I am bound to do, I cannot think that this appellant was one of those who are remunerated by a share of the profits. He was remunerated by a share of the profits and a wage of 1*l.* a week, his food, and some perquisites. If he had been asked and he had answered that he was one of those who were remunerated by a share of the profits his answer would not have been the entire truth but only a part of the truth. The same answer would have been the entire truth if given to a similar question by some other members of the crew. With the most sincere respect it seems to me rather a refinement to say that some words must be introduced into the text, either the word "wholly" or the word "partially," in order to place a construction on the statute. The effect, on my construction, would have been imposed upon us without possibility of doubt if the word "wholly" had been inserted; but it is not necessary to that construction; and while I must always feel anxious when I find myself differing, in my view when this Act says that all fishermen are to be compensated unless they be such as are remunerated by a share of the profits, it means that those shall be compensated

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who are remunerated by something besides a share of the profits. H. L. (E.)

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LORD ATKINSON. My Lords, I too feel the diffidence which my noble and learned friend who has preceded me said he felt when I find that my opinion is at variance with that which my noble and learned friend on the woolsack has expressed, and in which I understand some of my colleagues are about to concur. But I have heard nothing upon this occasion which leads me to come to a different conclusion from that which I arrived at on the first hearing of this appeal. I have had the advantage and pleasure of reading the judgment which has just been delivered by my noble and learned friend Lord Loreburn; I concur in it, I feel that I have nothing to add to it, and I have arrived at the conclusion at which he has arrived, namely, that the decision of the Court of Appeal is wrong and that this appeal should be allowed.

LORD MERSEY. My Lords, I confess that I have very little difficulty about this case. The question turns entirely upon three or four words in sub-s. 2 of s. 7 of the Act, and those words are these: "remunerated by a share in the profits." The question is, Was the appellant remunerated by a share in the profits? That he did receive shares is conceded. Were those shares not remuneration for his services? In my opinion they were; and if they were, then it seems to me that he was remunerated within the meaning of the Act. It is immaterial that he also received some wages. I think this appeal ought to be dismissed.

LORD PARKER OF WADDINGTON. My Lords, I also am of opinion that this appeal fails. There appear to me to be two substantial questions, the first of which is this: Was Costello, under the contract of service on which he founds his claim to compensation, entitled to a share of the profits? That appears to me to be a question simply and solely of construction, and having regard to the express words of the contract it appears to me that such construction is reasonably clear. He is to have, according to the words of the contract, for wages and remuneration the sum and



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share of profits specified against his name in the schedule. That contemplates that he will be entitled to a share of the profits, and that alone would I think in equity give him a specific right to the profits themselves as distinguished from a claim for further remuneration measured by those profits. But the point is made additionally clear because the agreement goes on to provide that, after the venture is over and so many days before the day for settlement, an account is to be delivered not only to persons who are wholly but to persons who are partly remunerated by shares in the profits; and it is impossible to give a meaning to those words "partly remunerated by a share in the profits" unless they be taken to refer to those members of the crew who were in the position of Costello, remunerated partly by wage and partly by a share of the profits.

The second question is simply and solely a question of construction of sub-s. 2 of s. 7 of the Act, and that question depends entirely on the answer to the question, Was Costello remunerated by a share of the profits of the venture? My Lords, I can entertain no doubt that the only possible answer to that question is in the affirmative. It is true that if Costello were bound in answer to that question to give the whole truth, he might have to qualify the affirmative answer by saying "Yes, but I am also entitled to wages," but by no possibility could an answer in the negative, however qualified, be a true answer.

My Lords, I am of opinion that the Act must be construed according to its literal meaning, and that it is impossible to introduce the words "solely" or "wholly" or even "substantially" as was done in the Scotch case; and the only answer to the question I have suggested being an affirmative, it follows in my opinion that the decision of the Court of Appeal was right.

*Appeal dismissed.*

*Lords' Journals, June 13, 1913.*

Solicitors for appellant: *Windybank, Samuel & Lawrence, for Benno Pearlman, Hull.*

Solicitors for respondents: *Pritchard & Sons, for Wallace & Macfadzean, Sunderland.*

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## [HOUSE OF LORDS.]

SCOTT (OTHERWISE MORGAN) AND ANOTHER . . APPELLANTS ; H. L. (E.)\*

AND

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May 5.

*Divorce—Practice—Nullity—Hearing in Camera—Publication of Proceedings after Decree—Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 2, 6, 22, 46—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.*

The Probate, Divorce and Admiralty Division has power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

*Barnett v. Barnett* (1859) 29 L. J. (P. & M.) 28, and *H. (falsely called C.) v. C.* (1859) 29 L. J. (P. & M.) 29 ; 1 Sw. & Tr. 605, followed and approved.

*A. v. A.* (1875) L. R. 3 P. & M. 230, overruled.

*D. v. D.* [1903] P. 144, considered.

*Per* Viscount Haldane L.C. : The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done ; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

*Per* Earl Loreburn : In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript, in contravention of the order directing that the cause should be heard in camera, Bargrave Deane J. found that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay

\* *Present* : VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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the costs of the motion, and an appeal from this order was dismissed as incompetent:—

*Held*, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a “criminal cause or matter” within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bargrave Deane J. (2)

On January 12, 1911, the appellant Annie Maria Scott, otherwise Annie Maria Morgan, filed a petition in the Probate, Divorce and Admiralty Division asking that the ceremony of marriage celebrated on July 8, 1899, at St. Mary’s Church, Ealing, between herself and the respondent might be declared null and void by reason of the respondent’s impotence.

The appellant Percy Braby acted as the petitioner’s solicitor in this suit.

On February 14, 1911, an order was made in the cause by the registrar, on a summons issued by the petitioner, appointing medical inspectors for the examination of the parties and ordering “that this cause be heard in camera.”

The petitioner attended for medical inspection in pursuance of this order and was reported to be a virgin. The respondent did not attend for inspection. The respondent had filed an answer denying that he was impotent, but the answer was by leave withdrawn.

On June 13, 1911, the cause was heard before the President in camera and a decree nisi was pronounced, the cause being undefended. On January 15, 1912, the decree nisi was made absolute. In August, 1911, the petitioner instructed her solicitor, the appellant Braby, to obtain for her from the Court a transcript of the proceedings at the hearing of the cause, and, at her instance, the solicitor had three copies made of this transcript. One copy the petitioner sent to Mr. Graham Scott, the respondent’s father, the second she sent to Mrs. Westenra, a sister of the respondent, and the third to another person.

(1) [1912] P. 241.

(2) [1912] P. 4.

On November 23, 1911, the respondent issued a notice of motion, intituled in the cause only, asking that the appellants might be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause "in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera."

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The notice of motion further asked that the appellants might be restrained from making any similar or other communications either directly or indirectly concerning the subject-matter of the cause, and from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that they might be directed to state on oath the names and addresses of the persons to whom similar communications had been made. The notice of motion was also addressed to Mr. Waller, Mr. Braby's partner, but at the hearing it was admitted that he had no part in the matter.

The petitioner, in an affidavit in opposition to the motion, stated that she sent the copies of the transcript to the three persons aboved named in consequence of reports issued by the respondent reflecting on her sanity and in defence of her reputation, and tendered an apology to the Court if it should be held that she had contravened the order of February 14, 1911.

On December 4, 1911, the motion was heard before Bargrave Deane J., who found that the appellants had been guilty of contempt of Court and ordered them to pay the costs of the motion.

The appellants appealed, and upon the appeal the preliminary objection was taken by the respondent that the appeal was incompetent on the ground that the order appealed from was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873.

The appeal was originally argued before Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., but it was ultimately ordered to be re-argued before the Full Court of Appeal.

The Court (Cozens-Hardy M.R., Farwell, Buckley, and Kennedy L.JJ. (Vaughan Williams and Fletcher Moulton L.JJ.



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Having regard to the public importance of the questions involved in this appeal and to the probability that the respondent might not be represented by counsel, the Treasury, acting on the advice of the Attorney-General, provided counsel to argue the case from the respondent's point of view.

1913. March 3, 4, 7, 11. *Sir R. Finlay, K.C.*, and *Barnard, K.C.* (with them *W. O. Willis*), for the appellants. 1. The order of *Bargrave Deane J.*, directing the appellants to pay the costs of the motion to commit, was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal lay from it. The form of the notice of motion shews that the respondent was really applying for civil relief. It is not intituled in the manner universally adopted in quasi-criminal proceedings, namely, in the suit and in the matter of an application to commit the respondents to the motion for contempt of Court, and, in addition to committal, it asks for an injunction and discovery. The motion was a mere step in the civil proceedings and was not a criminal matter at all.

The exception to the right of appeal in s. 47 is confined to causes or matters relating to crimes which are indictable or criminal offences which are punishable summarily. Mere disobedience to an order of the Court, though it may result in imprisonment, does not fall within the section: *Attorney-General v. Bradlaugh* (1); *Reg. v. Barnardo* (2); *O'Shea v. O'Shea and Parnell* (3); *In re Evans*. (4) [Upon this point they also referred to *Cox v. Hakes* (5); *Reg. v. Fletcher* (6); *Reg. v. Steel* (7); *Witt v. Corcoran* (8); *Stevens v. Metropolitan District Ry. Co.* (9); *Bristow v. Smyth* (10); *Mellor v. Denham* (11);

(1) 1885) 14 Q. B. D. 667, at p. 687.

(2) 1889) 23 Q. B. D. 305, at pp. 308, 309.

(3) 1890) 15 P. D. 59, at pp. 63, 64.

(4) [1893] 1 Ch. 252.

(5) 1890) 15 App. Cas. 506.

(6) 1876) 2 Q. B. D. 43.

(7) 1876) 2 Q. B. D. 37.

(8) 1876) 2 Ch. D. 69.

(9) 1885) 29 Ch. D. 60.

(10) 1885) 2 Times L. R. 36.

(11) 1880) 5 Q. B. D. 467.

*Reg. v. Whitechurch* (1); *Reg. v. Foote* (2); *In re Dudley* (3); *In re Hardwick* (4); *In re Freston* (5); *Seldon v. Wilde* (6); *Harvey v. Harvey* (7); *Helmores v. Smith* (8); *In re Johnson* (9); *Crowther v. Elgood* (10); *Preston v. Etherington* (11); *In re Wray* (12); *Reg. v. Jordan* (13); *Ex parte Woodhall* (14); *Hunt v. Clarke* (15); *Rex v. Tibbits* (16); *In re Ashwin* (17); *In re Eede* (18); *Ex parte Pulbrook* (19); *In re Armstrong* (20); *Attorney-General v. Kissane* (21); *Seaman v. Burley* (22); *Southwark and Vauxhall Water Co. v. Hampton Urban District Council* (23); *In re Edgcome* (24); *Robson v. Biggar* (25); *Ex parte Fernandez* (26); *Cobbett v. Slowman* (27); *Stark v. Stark*. (28)]

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2. An order in a nullity suit for hearing in camera, assuming that there is jurisdiction to make it, does not prevent the subsequent publication of the proceedings. The order of Bargrave Deane J. goes far beyond any jurisdiction ever claimed or exercised by the Ecclesiastical Courts, yet the respondent bases his case upon the practice of the Ecclesiastical Courts, which is preserved by s. 22 of the Matrimonial Causes Act, 1857, in suits which were formerly within the jurisdiction of those Courts. Take the case of an innocent man summoned to answer scandalous charges of such a nature that it is necessary that the case should be heard in camera. A bald statement of the dismissal of the action would not clear his character. Can it be said that there is a duty cast upon him not to divulge the evidence given at the hearing for the purpose of vindicating his conduct? Of course

(1) (1881) 7 Q. B. D. 534.

(2) (1883) 10 Q. B. D. 378.

(3) (1883) 12 Q. B. D. 44.

(4) (1883) 12 Q. B. D. 148.

(5) (1883) 11 Q. B. D. 545.

(6) [1911] 1 K. B. 701.

(7) (1884) 26 Ch. D. 644.

(8) (1886) 35 Ch. D. 449.

(9) (1887) 20 Q. B. D. 68.

(10) (1887) 34 Ch. D. 691.

(11) (1887) 36 W. R. 49.

(12) (1887) 36 Ch. D. 138.

(13) (1888) 36 W. R. 797.

(14) (1888) 20 Q. B. D. 832.

(15) (1889) 58 L. J. (Q.B.) 490.

(16) [1902] 1 K. B. 77.

(17) (1890) 25 Q. B. D. 271.

(18) (1890) 25 Q. B. D. 228.

(19) [1892] 1 Q. B. 86.

(20) [1892] 1 Q. B. 327.

(21) (1893) 32 L. R. Ir. 220.

(22) [1896] 2 Q. B. 344.

(23) [1899] 1 Q. B. 273.

(24) [1902] 2 K. B. 403.

(25) [1908] 1 K. B. 672.

(26) (1861) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.

(27) (1850) 4 Ex. 747; (1854) 9 Ex. 633.

(28) [1910] P. 190.

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a malicious disclosure of the evidence would be restrained; but any abuse of this right of publication could be effectively dealt with by the ordinary law. If the proprietor of a newspaper published the evidence of a nullity suit which had been heard in camera he would be criminally liable for an obscene libel. In *Lawrence v. Ambery* (1), which is the only previous case in which this point has arisen, Sir Francis Jeune appears to have expressed an opinion that there could be no disclosure of what had been heard in camera, but that dictum was obiter only, and the motion for attachment was dismissed. The effect of the practice of the Ecclesiastical Courts, as summed up in the judgment of Fletcher Moulton L.J., is that an order for hearing in camera related only to the mode of conducting the hearing and had no reference to subsequent publication, and that the Court never assumed power in matrimonial cases to enjoin perpetual silence upon the parties or others. *Rex v. Clement* (2), upon which Farwell L.J. relied, really supports the appellants' contention. There several persons charged with high treason by the same indictment severed in their challenges and were consequently tried *seriatim*. Abbott C.J. having stated publicly that he thought it necessary to prohibit any publication of the proceedings until they were completely terminated, it was held that the proprietor of a newspaper who had published an account of the trial of two of the prisoners whilst the others remained to be tried was properly found guilty of a contempt of Court; but the basis of the decision was that the trial of all the prisoners constituted one entire proceeding. Subsequent publication may be prohibited in cases relating to trade secrets and to wards of Court and lunatics, but those cases depend upon different principles and have no bearing on the present case.

3. The Court had no jurisdiction to make the order for hearing in camera. In the Court below the Master of the Rolls relied upon the view expressed by Sir Francis Jeune in *D. v. D.* (3) that the Court possessed an inherent jurisdiction to hear any case in private where it was necessary for the due administration of justice. But the rule of English law is that all cases must be

(1) (1891) 91 L. T. Jo. 230.

(2) (1821) 4 B. &amp; Ald. 218.

(3) [1903] P. 144.

heard in open Court subject to certain specified classes of exceptions. This is stated explicitly by Jessel M.R. in *Nagle-Gillman v. Christopher* (1), where he lays it down that the High Court has no power to hear cases in private, even with the consent of the parties, except (1.) in cases affecting lunatics and wards of Court or (2.) where a public trial would defeat the whole object of the action or (3.) where the practice of the old Ecclesiastical Courts in this respect is continued. The appellants submit that the last exception is not well founded, but they rely upon the general proposition of law there stated. The first exception depends upon the quasi-paternal jurisdiction which the Court, acting as the representative of the King as *parens patriæ*, exercises for the protection of the lunatic or ward of Court. Accordingly, in the case of a ward of Court, it has been held that the Court, without the consent of the parties, may make an order for hearing in private—*Ogle v. Brandling* (2)—and may treat as a contempt of Court the subsequent publication of the proceedings: *In re Martindale*. (3) The second exception relates primarily to cases of trade secrets, and in such cases also it may be necessary to prohibit disclosure after the trial in order to prevent the destruction of the property the subject-matter of the action: *Andrew v. Raeburn* (4); *Mellor v. Thompson* (5); *Badische Anilin und Soda Fabrik v. Levinstein*. (6) In *Malan v. Young* (7), the Sherborne School libel action, Denman J., with the consent of the parties, made an order for hearing in camera, notwithstanding the protest of a barrister, but during the progress of the trial the learned judge stated that considerable doubt existed amongst the judges as to his jurisdiction to make the order and invited the parties to elect whether they would take the risk of proceeding with the case in camera or would begin de novo in open Court; and in the result the case was heard in private before the judge as arbitrator. That case therefore is not an authority in support of the inherent jurisdiction of the Court to hear cases in camera.

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(1) (1876) 4 Ch. D. 173; 46 L. J. (Ch.) 60.

(2) (1831) 2 Russ. & My. 688.

(3) [1894] 3 Ch. 193.

(4) (1874) L. R. 9 Ch. 522.

(5) (1885) 31 Ch. D. 55.

(6) (1883) 24 Ch. D. 156.

(7) (1889) 6 Times L. R. 38.



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[EARL OF HALSBURY referred to *Lord Portsmouth's Case*. (1) ]

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With regard to the third exception, s. 22 of the Matrimonial Causes Act, 1857, provides that in all suits other than a suit for dissolution, that is to say, in all suits which could have been entertained by the old Ecclesiastical Courts, the Court is to act upon the principles of the Ecclesiastical Courts, but subject to the provisions of the Act and the rules and orders thereunder. The proviso is important. Sect. 46 provides that, subject to any rules and regulations made under the Act, the witnesses are to be examined orally in open Court. Sect. 53 empowers the Court to make rules and regulations concerning the procedure under the Act, and by s. 67 these rules and regulations are to be laid before Parliament. The effect of these sections taken together is that all suits in the Divorce Court are to be heard in open Court, subject to any rules and regulations which may be made to the contrary. The only rule which relates to the mode of hearing is r. 205 of the Divorce Rules and Regulations, but that rule gives no authority to the Court to hear cases in camera. Therefore, if there ever was any power in the Ecclesiastical Courts to order proceedings in nullity suits to be heard in camera, that power has been taken away by the terms of the Act. The appellants admit that a practice supposed to be based upon the practice of the Ecclesiastical Courts has sprung up by which suits for nullity have been heard in camera, but it is submitted that there is no justification for that practice. In *Barnett v. Barnett* (2), which was decided very shortly after the passing of the Matrimonial Causes Act, 1857, Sir Cresswell Cresswell held that the Act did not confer upon the Court any power to order a matrimonial suit to be heard in camera. That was a suit for judicial separation, which could have been entertained by the Ecclesiastical Courts; and as regards the practice of the Ecclesiastical Courts there is no ground for distinguishing between a suit for nullity and any other suit which those Courts could have entertained—divorce a mensa et thoro, restitution, jactitation. That case was followed in the same year by *H. (falsely called C.) v. C.* (3), which was a nullity

(1) (1815) G. Coop. Ch. Ca. 106.

(3) 29 L. J. (P. &amp; M.) 29; 1 Sw.

(2) 29 L. J. (P. &amp; M.) 28.

&amp; Tr. 605.

suit, where the Full Court (Sir Cresswell Cresswell, Williams J., and Bramwell B.) held that the Divorce Court had no power to sit otherwise than with open doors. In *C. v. C.* (1) Lord Penzance held that he had no power to hear a suit for dissolution in camera, although he expressed the opinion obiter that nullity suits might be heard in private by virtue of s. 22 of the Matrimonial Causes Act, 1857. In *A. v. A.* (2) Sir James Hannen held that he had power, even without the consent of the parties, to hear a suit for restitution of conjugal rights in private, and he based his decision upon the practice of the Ecclesiastical Courts. In *D. v. D.* (3), where there were consolidated suits, namely, a suit by the wife for judicial separation and a suit by the husband for dissolution of marriage, Sir Francis Jeune, with the consent of the parties, ordered the suits to be heard in camera, and his judgment proceeded partly on the ground of the inherent jurisdiction of the Court, and partly on the ground that the Court had inherited the powers and practice of the Ecclesiastical Courts. Those cases are inconsistent with *H. (falsely called C.) v. C.* (4) and ought to be overruled. Further, it is a mistake to suppose that it ever was the practice of the Ecclesiastical Courts to hear nullity suits or any other matrimonial suits in private. Under that practice the witnesses on each side were examined in private, and in the absence of the parties, before an examiner, and the mode of cross-examination was by interrogatories previously delivered to the examiner by the adverse party, but after the publication of the depositions all causes were heard publicly in open Court: Shelford on Marriage and Divorce, pp. 520, 522, 524, 530. And see Conset's Ecclesiastical Practice, 3rd ed., p. 158, and Blackstone's Commentaries, 11th ed., vol. 3, pp. 448—450. Until 1843 nullity suits were reported with the full names of the parties, and until 1864 there never was any hearing of nullity suits in private. (5) The modern practice is founded upon a misapprehension of the powers of the Ecclesiastical Courts.

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4. Assuming that the order of Bargrave Deane J. was within

(1) (1869) L. R. 1 P. & M. 640.

& Tr. 605.

(2) L. R. 3 P. & M. 230.

(5) See reporter's note to *A. v. A.*,

(3) [1903] P. 144.

3 P. & M. at p. 232.

(4) 29 L. J. (P. & M.) 29; 1 Sw.

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his jurisdiction, the publication was privileged, and the appellants ought not to have been ordered to pay the costs of the motion :  
*In re Pollard*. (1)

*Sir John Simon, S.-G.*, and *Danckwerts, K.C.* (with them *Bayford*), for the respondent 1. As to the question of jurisdiction, the appellants' contention with regard to the practice of the Ecclesiastical Courts is clearly wrong. In a note to *Briggs v. Morgan* (2) reference is made to a nullity suit (August 1, 1821) the medical evidence in which was heard "in camera." That reference shews not only that the evidence was taken in private, but that the presentation to the Court was also in private. In *Deane v. Aveling* (reported on hearing 1 Rob. Eccl. 279) on May 13, 1845, an application was made by letter for the hearing of a nullity suit in private (3), and the letter assumes that the matter was within the discretion of the judge. It does not appear whether the application was granted. Those cases are sufficient to shew that the Ecclesiastical Courts had the power to hear nullity suits in private, although that power was not universally exercised; and the existence of this power is recognized by the text-writers: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, c. 14, s. 10; Swabey's Law of Divorce and Matrimonial Causes, 2nd ed., p. 97. This was also the view of a number of very eminent judges,—Jessel M.R., Lord Penzance, Lord Hannen, and Lord St. Helier. As regards the getting in of the evidence, it was the invariable practice of the Ecclesiastical Courts to examine the witnesses in secret: *Herbert v. Herbert* (4), which is the foundation for the passage in Shelford on Marriage

(1) (1868) L. R. 2 P. C. 106.

(2) (1820) 2 Hagg. Cons. at p. 332.

(3) The following is a copy of this letter:—

"Doctors Commons,  
 "13th May, 1845.

"Dear Sir,

"*Deane agst. Aveling*."

"As this is a case of nullity of marriage by reason of malformation to avoid unnecessary publicity of the disclosures in the evidence we

shall feel obliged by your intimating our wishes to the judge that *if he shall be so pleased* it may be heard in private.

"We are, Dear Sir,

"Yours faithfully,

"W. Rothery.

"Edwd. W. Crosse.

"Jno. Shephard, Esq."

(See addendum at p. 487.)

(4) (1819) 2 Hagg. Cons. 263, at p. 267.

and Divorce on p. 522; Conset's Ecclesiastical Practice (1685), pt. iii., s. 3; pt. vi., s. 4. When the evidence was complete publication was decreed, which meant, not publication to the world, but communication to the other party to the suit: see Coote's Ecclesiastical Practice, p. 806. Then as to the hearing and judgment or sentence, it is conceded that the sentence was required to be given in open Court: Burn's Ecclesiastical Law, tit. Marriage XI. (Divorce), s. 7. That is expressly provided by canon 106 of the Canons of 1603, and canon 108 imposes penalties for the violation of this rule. The reason for that rule was obviously that it was essential that in any proceedings affecting a question of status the result should be publicly known. But there is no corresponding provision as to the hearing of the suit, and the fact that it is expressly provided that the sentence shall be in open Court lends support to the inference that no such rule existed as to the hearing. The statement in Shelford on Marriage and Divorce, p. 530, that all causes are heard publicly in open Court was conveyed without acknowledgment from the report of an Ecclesiastical Commission appointed in 1830 to inquire into the practice of the Ecclesiastical Courts, and, divorced from its context, it is misleading. The main issue to be determined by that Commission was whether the method adopted by the Common Law Courts of viva voce evidence ought not also to be adopted by the Ecclesiastical Courts, and the Commission, when, in describing the practice of the Ecclesiastical Courts, it speaks of the hearing in open Court, was using the words in connection with that issue. It was not referring to the admission or non-admission of the public, but was contrasting the method of hearing, which was before the judge in Court in the presence of the parties, with the secret examination of witnesses which it had previously described: Parliamentary Papers 1831-32, vol. 24, pp. 18, 19. Moreover the Commission was not dealing with this special class of cases, namely, nullity suits, at all. [They referred to Burn's Ecclesiastical Practice (9th ed.), vol. 3, pp. 202, 207.] Therefore the passage in Shelford is not an authority against the respondent's contention.

Assuming then that the Ecclesiastical Courts had jurisdiction to

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hear causes in private, that power is preserved by s. 22 of the Matrimonial Causes Act, 1857. Sect. 46 is not opposed to this view. Until 1854 the Ecclesiastical Courts had no power to examine witnesses *viva voce*, but in that year an Act was passed (17 & 18 Vict. c. 47) conferring that power upon them. In that state of things s. 46 of the Act of 1857 says, not that the trial shall be in open Court, but that the witnesses shall be examined orally in open Court. That section is not aimed at the admission of the public to the Court, but is intended to secure that the method of taking evidence shall be by oral examination before the judge in Court as distinguished from the old method of examination in secret. But, whatever be the construction of s. 46, it is prefaced by the words "Subject to such rules and regulations as may be established as hereinafter provided" (see s. 53), and it is submitted that r. 205 of the Divorce Rules, though it contains no specific provision as to hearing in camera, is wide enough to create, if need be, the necessary exception to s. 46. As regards *H. (falsely called C.) v. C.* (1) the report contains no reference to s. 22 and the case must be read with the suspicion that that section was not before the Court. Further, Williams J., although he expresses his opinion that the Court, being a new Court, had no jurisdiction to hear cases in camera, admits that other judges had taken a different view, and he assumes that he had a discretion in the matter and declines to exercise it. Bramwell B. starts from the same point and, on the assumption that the Court is a new Court, says it has no jurisdiction to hear in private. There is, however, a stream of authority subsequent to that case shewing that the Court has such a jurisdiction. In *C. v. C.* (2) Lord Penzance says in terms that the Ecclesiastical Courts did hear nullity suits in private and that the Divorce Court had maintained and followed up that practice. In *A. v. A.* (3) Sir James Hannen puts the case higher and states that the power of the Ecclesiastical Courts was not limited to nullity suits and that the Divorce Court had the same power, and he adds that the rule laid down in *H. (falsely called C.) v. C.* (1) had not been acted upon. In

(1) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

(2) L. R. 1 P. & M. 640.

(3) L. R. 3 P. & M. 230.

*Nagle-Gillman v. Christopher* (1) Jessel M.R. states distinctly that the practice of the Ecclesiastical Courts to hear suits for nullity or judicial separation in private was preserved by s. 22 of the Matrimonial Causes Act, 1857. Finally in *D. v. D.* (2) Sir Francis Jeune states not only that the Divorce Court had inherited the power of the Ecclesiastical Courts to hear cases in camera, but that the Court had an inherent power to hear a suit for dissolution in camera. He bases his decision upon the general power of the Court to hear in camera any case in which justice cannot be done otherwise and suggests that in many matrimonial cases a hearing in public would bring about a denial of justice because a modest woman would refuse to assert her rights. Such a power is required in the interests of justice and to enable the Court to maintain its own efficiency and its own dignity. Both the general rule as to hearing in open Court and the exceptions thereto are explicable upon the common principle that the Court will so conduct its business as to do justice efficiently. The gravity of the consequences of insisting upon a hearing in public in matrimonial cases may be just as great as in the case of a trade secret, for in both instances the result might be to defeat the ends of justice. Putting aside the cases of wards of Court and lunatics, hearing in camera is not confined to trade secrets, but may be ordered wherever the object of the suit would be defeated. Neither *Andrew v. Raeburn* (3) nor *Mellor v. Thompson* (4) was a case of a trade secret. It is an axiom of English law that prima facie the administration of justice should be open to all the world, but that is not an absolute rule of natural justice, and the cases which have been cited are illustrations of the general power of the Court to exclude the public wherever the interests of justice require it. See *Lewis v. Lery*. (5) This jurisdiction existed in the Divorce Court apart from the Judicature Act, but, if necessary, the respondent prays in aid the provisions of that Act. In the Children Act, 1908, s. 114, which expressly empowers the Court to exclude the public whilst a child or young person is giving

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(1) 4 Ch. D. 173; 46 L. J. (Ch.)  
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(2) [1903] P. 144.

(3) L. R. 9 Ch. 522.

(4) 31 Ch. D. 55.

(5) (1858) E. B. & E. 537, at  
p. 546, per Lord Campbell.

H. L. (E.) evidence in any proceedings relating to an offence against decency or morality, the Legislature has been careful to preserve to the Court any power which it might have independently to hear cases in camera. [They also referred to the Summary Jurisdiction Act, 1848; s. 12.] Further, the jurisdiction of the Court to make the order for hearing in camera was not contested by the appellants in the Court of Appeal, and therefore the point is not now open to them : *Kay v. Marshall*. (1)

2. As to subsequent publication, the privilege of reporting what takes place in a Court of justice is based on the fact that the hearing is in public, and the publication of the proceedings is merely enlarging the area of the Court : *Macdougall v. Knight* (2); and see *Popham v. Pickburn*. (3) It follows that in cases where the public is excluded from audience the privilege of publication goes too, since the public has no right to this secondary form of audience, which stands on no higher ground than the right to attend in Court and hear. The maxim "Cessante ratione cessat lex" applies. In cases such as nullity suits the protection accorded by an order for hearing in camera ought as a matter of common sense to be extended to the subsequent publication of the proceedings : *Lawrence v. Ambery* (4) and see *In re Martindale*. (5)

[LORD ATKINSON referred to *M'Leod v. St. Aubyn*. (6)]

3. Assuming that a contempt was committed, the question whether it was a criminal contempt within s. 47 of the Judicature Act, 1873, depends upon whether the disobedience to the order was an interference with the course of justice or was merely an interference with the rights of the parties. The order for the hearing in camera was made not to secure a private right but for the efficient administration of justice, and disobedience to such an order is a misdemeanour punishable by fine and imprisonment. *Seaward v. Paterson* (7) illustrates the difference between

(1) (1841) 8 Cl. & F. 245.

p. 136.

(2) (1889) 14 App. Cas. 194, at pp. 200, 206.

(4) 91 L. T. Jo. 230.

(5) [1894] 3 Ch. 193, at p. 200.

(3) (1862) 31 L. J. (Ex.) 133, at

(6) [1899] A. C. 549.

(7) [1897] 1 Ch. 545.

the two kinds of contempt. When once the matter is before the Court, the question whether or not a criminal contempt has been committed cannot depend upon the form of the application to commit. The Court of Appeal was therefore right in allowing the objection to the competency of the appeal. [Upon this point, in addition to the cases cited by the appellants, they referred to *Russell on Crimes*, 5th ed., vol. 1., p. 561; *Chitty on Criminal Law*, 2nd ed., vol. 2, p. 279; *Miller v. Knox* (1); *In re Clement* (2); *Wellesley v. Mornington* (3); *Reg. v. Rudge* (4); *Ex parte Savarkar*. (5)]

*Sir R. Finlay, K.C.*, replied.

The House took time for consideration.

May 5. VISCOUNT HALDANE L.C. (6) My Lords, the facts in this case are not in controversy, but questions of law of considerable public importance are raised.

The appellant Mrs. Scott filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open Court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on January 15, 1912, made absolute.

In August, 1911, the appellant Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case, and of what really took place.

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(1) (1838) 4 Bing. N. C. 574.

(2) (1822) 11 Price, 68.

(3) (1848) 11 Beav. 181.

(4) (1886) 16 Q. B. D. 459.

(5) [1910] 2 K. B. 1056.

(6) Read by Lord Atkinson.



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In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by Bargrave Deane J., who decided that the two appellants had been guilty of contempt of Court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of Bargrave Deane J. amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873. The Court of Appeal, consisting of the Master of the Rolls and Fletcher Moulton and Kennedy L.JJ., ordered the appeal to be re-argued before the Full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. The Master of the Rolls and Farwell, Buckley, and Kennedy L.JJ. were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton L.JJ. took a different view.

My Lords, the question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion as to whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in the Courts below.

My Lords, I think it is established that the Ecclesiastical Courts in the exercise of their jurisdiction in nullity suits, prior to the Act of 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these Courts was very

different from that of the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence *viva voce* in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place.

This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage was that arguments were heard by the judge of the Court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open Court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open Court. But sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open Court. As regards the arguments the Court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the Ecclesiastical Courts in matrimonial proceedings was terminated by the statute of that year, and a new Court was established with the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce *a mensa et thoro*, and a wholly new power was given to entertain petitions for dissolution of marriage. Sect. 22 provided that in all suits and proceedings, other than proceedings for dissolution, the Court should proceed and act and give relief on

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principles and rules which in its opinion should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts acted, but this was to be done subject to the provisions of the statute itself, and of the rules and orders made under it. By s. 36 the Court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open Court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open Court, if the opposite party so desired. By s. 53 power was given to the Court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament.

My Lords, I think that the effect of s. 46 of the Divorce Act was substantially to put an end to the old procedure, and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary Courts of justice might have power to make it. This appears to have been the view taken in the cases of *Barnett v. Barnett* (1) and *H. (falsely called C.) v. C.* (2), both decided in 1859, shortly after the Divorce Act had come into operation. The second case came before the Full Court, which included Bramwell B. In giving his judgment he observes that the Divorce Court "being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its

(1) 29 L. J. (P. &amp; M.) 28.

(2) 29 L. J. (P. &amp; M.) 29; 1 Sw. &amp; Tr. 605.

proceedings should be conducted in public." It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by Bramwell B., and for some time this interpretation appears to have been adhered to.

In a note to the case of *A. v. A.* (1), decided in 1875, the reporter observes that down to July, 1864, nullity cases were always heard in open Court, but that in the case of *Marshall v. Hamilton* (2) the evidence was of such a character that Sir J. Wilde signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A. v. A.* (1), however, Sir James Hannen held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on a dictum in *C. v. C.* (3) to the effect that the Court had power, under s. 22 of the Divorce Act, to follow the old practice, and partly on a new practice which had begun to grow up.

My Lords, I think that Sir James Hannen laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

My Lords, it was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old Ecclesiastical Courts possessed to hear in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that Sir James Hannen's judgment was followed by Sir Francis Jeune in *D. v. D.* (4) But while that learned judge held, somewhat hesitatingly I think, that

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(1) L. R. 3 P. &amp; M. 230.

(3) L. R. 1 P. &amp; M. 640.

(2) (1864) 3 Sw. &amp; Tr. 517.

(4) [1903] P. 144.



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the Divorce Court had in a suit for judicial separation inherited the power of the Ecclesiastical Courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. My Lords, this second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B., in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But Sir Francis Jeune does not appear to have thought that it could. He proceeds, in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all Courts.

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew v. Raeburn* (1) Lord Cairns and James and Mellish L.JJ. appear to express themselves in its favour, but in carefully guarded terms. In

(1) L. R. 9 Ch. 522.

interpreting their decision I think that North J. in *In re Martindale* (1), which was cited to us, went much too far, and, while I agree generally with the judgment of Sir George Jessel M.R. in *Nagle-Gillman v. Christopher* (2), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the Ecclesiastical Courts, I cannot concur in it. The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and over-riding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly

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(1) [1894] 3 Ch. 193.

(2) 4 Ch. D. 173.

H. L. (E.) yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

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I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex v. Clement* (1), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

My Lords, it may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration

(1) 4 B. & Ald. 218.

of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature. I observe that in the Incest Act of 1908 the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case.

My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the

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Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in *camera* is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Courts below. I move accordingly.

EARL OF HALSBURY. My Lords, the facts out of which this question arises have been sufficiently explained by the Lord Chancellor, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them.

I am of opinion that every Court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think it is a mistake as to some of the so-called exceptions thus to describe them, but I want in the first instance to emphasize the broad rule I believe to be the law.

I believe this has been the rule, at all events, for some centuries, but, as I will attempt to shew presently, it has been the unquestioned rule since 1857, unquestioned by anything that I can recognize as an authority. My Lords, if this were

merely an antiquarian investigation I might point to the treatise of Mr. Emlyn in 1730, as a preface to the second edition of the State Trials, in six volumes folio. "In other countries," Mr. Emlyn says (at p. iv.), "the Courts of justice are held in secret; with us publicly and in open view."

He is there speaking of criminal trials, but he certainly has no good word to say of the Ecclesiastical Courts of his time, and if he could have added that they claimed a right to sit in secret he certainly would not have omitted to do so.

Mr. Daines Barrington, writing in 1766, and suggesting that the Courts were not open as of right in the time of Edward I., even in England (1), says "In the modern sense of an open Court the Legislature could never have allowed any fees to be taken for admittance." "I do not recollect," he adds, "to have met in any of the European laws with any injunction that all Courts should be held *ostiis apertis*, except in those of the republic of Lucca." At all events Mr. Daines Barrington and Mr. Emlyn (both learned lawyers) were under the impression that the law of England required in their days that Courts should be open; this may be a matter for legal research, but the law as it now stands requires no such investigation. It has been settled by statute, and the exception supposed to have been introduced as to the Ecclesiastical Courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those Courts by Lord Moulton in his judgment in the Court of Appeal and the instructive judgment of the noble lord, Lord Shaw, which I have had the privilege of reading.

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires

(1) [Observations on Statutes, ed. 1796, p. 144. Barrington's comment is on the Statute of Westminster the Second, cc. 42, 44, which he seems to have misunderstood. The excessive fees there in question were taken from parties, not from the public, and

"*pro ingressu vel egressu.*" But Barrington wanted to air his own opinion that the idle spectators who crowded the Courts might well be kept down by a moderate fee for admission.—F. P.]

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to be stated, forms part of the public administration of justice at all.

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Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (*In the Matter of Lord Portsmouth* (1)) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the *Sherborne School* case, *Malan v. Young* (2), it was clearly recognized that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it. Your Lordship has said that a mere desire to consider feelings of delicacy or to exclude from public hearing details which it would not be desirable to publish is not, in your Lordship's opinion, enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the general procedure in English Courts of justice, and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.

I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say

(1) G. Coop. Cas. in Ch. 106.

(2) 6 Times L. R. 38.

I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

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I confess I am amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J., and Bramwell B. (in *H. (falsely called C.) v. C. (1)*) overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation upon this very point—after consultation with the Judge Ordinary—and determining that “the Court had no power to sit otherwise than with open doors.”

My Lords, from that judgment there was no appeal, and I should have thought until it was brought before this House it would have been accepted as the law, but considering that Lord St. Helier’s decision (*D. v. D. (2)*) has never been challenged, I do not wonder that the order was made apparently as a matter of course in this case.

My Lords, as to the injunction of perpetual secrecy, there is not a judgment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all.

In the one case the trade secret is being protected as a species of property, and, indeed, the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which these words are used in the Judicature Act, and I think they ought to have heard the appeal, and I entirely agree to the motion which the Lord Chancellor has proposed.

EARL LOREBURN. My Lords, I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test

(1) 1 Sw. & Tr. 605.

(2) [1903] P. 144.



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of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming Bargrave Deane J. had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of Court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed Bargrave Deane J.'s decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I would prefer to take leave of this litigation altogether, for the function of a Court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the Courts below, I feel constrained to say something, as little as possible.

In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has any one, and if so, who and to whom, and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old Ecclesiastical Courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of Court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is

there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed Court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

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I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.

It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the

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exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D. v. D.* (1), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the Matrimonial Causes Act, 1857, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857, as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the

(1) [1903] P. 144.

limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception. I incline to the opinion that the High Court also may make such rules, but this was not argued.

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In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the Court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open Court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the Legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is, what power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over? It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully



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goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court. But what is the degree and duration of secrecy which the Court can impose?

Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think we are driven to say that there is jurisdiction to treat as a contempt of Court any wilful and malicious publication of such a kind as that, if it were known to be allowed, ordinary sensible people would not come to the Court at all.

This conclusion appears to me the inevitable corollary once you admit that a case of trade secret can be heard in camera. And I think it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration. The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes

within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished.

I have felt very strongly in this case the duty so admirably expressed by Fletcher Moulton L.J., that Courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a Court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publication shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on the one hand, and on the other hand no administration of justice in such cases at all. That is not to be considered here as a matter of policy but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

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LORD ATKINSON. My Lords, I concur. The argument in this case has ranged over a very wide field: many topics have been discussed, principles of vast importance have been laid down, principles which in their application might, I think, involve a serious encroachment on the liberty of the subject, but the fundamental proposition upon which the respondent's case in the ultimate result rests is, in my view, this, that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor have been guilty of any contempt of Court, nor disobeyed any order of Court, nor committed any crime, and the order

H. L. (E.) of Bargrave Deane J. was not, and could not have been, made in any criminal cause or matter. In my view the proposition is unsustained by authority and is in itself unsound. Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is I think based on a false analogy, and the second involves a fallacy. Cases such as *Badische Anilin und Soda Fabrik v. Levinstein* (1), *Andrew v. Raeburn* (2), and *Mellor v. Thompson* (3) were cited, and it was sought to apply the principles on which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. In it a secret process was involved. The whole value of the property in the process in most, if not all, of such cases depends on the details of the process being kept secret. If the secret be disclosed the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained.

*Andrew v. Raeburn* (2) was a suit for an injunction to restrain the publication of certain letters which passed between one or other of the plaintiffs in the suit and a third party. The application with which Lord Cairns dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one "which would cause an entire destruction of the matter in dispute."

(1) 24 Ch. D. 156.

(2) L. R. 9 Ch. 522.

(3) 31 Ch. D. 55

Lord Cairns, in giving judgment, said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private, even without the consent of both parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." This is the very principle upon which the cases dealing with secret processes were decided. *Mellor v. Thompson* (1) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit even after the cause has ended may, no doubt, cause pain, but it cannot render property valueless or cause the destruction of the whole matter of dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively.

Even, therefore, if it should be held to be the law that in the former class of suits all persons should, for the special reasons indicated, be enjoined to perpetual silence touching everything disclosed during a hearing in camera, it would, in my view, be quite illegitimate to attempt to extend a practice springing in these cases from the very necessity of things, and adopted for a special and peculiar object, to suits of the latter kind, in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs the practice was designed to guard against.

These authorities, therefore, afford, in my opinion, no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect: it is said that it would be futile to order a nullity suit to be heard in camera if every one were free, after the hearing, to publish an account of the proceedings. The answer to that is, that this is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to Sir Francis Jeune, justice cannot be

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done, namely, this, that the parties concerned, especially the woman, should be examined in private; and, secondly, because if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open Courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or, possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, &c. To say, therefore, that an order to hear a cause in camera would be futile if people were left free to publish what took place there after the cause had ended involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is free to libel or slander his neighbour.

An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order, and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition contended for. And what makes the lack of direct authority all the more strange, if the proposition be sound, is this, that the records of the old Ecclesiastical Courts have been searched; passages from several old books on the practice of those Courts have been quoted; a parliamentary report, dealing, amongst other things, with the practice of the Ecclesiastical Courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to shew that not only had those Courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has been found to convey even the faintest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention

were sound, some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency.

Speaking for myself I must therefore decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity.

I think the order in its true interpretation means what on its face it plainly says, and nothing more, namely, this, that the place where the case is to be heard shall be a private chamber, not a public Court. All the consequences I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date. One of the strangest things in this strange case is that the case of *Rex v. Clement* (1) should be cited as an authority for the proposition that a Court of Assize or one of the Divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial.

That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded not guilty. The issue knit on that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any, and which of them were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together had they joined in their challenges. They severed in their challenges, however, with the consequence that of necessity this single issue was split up into several branches, and they were tried seriatim; but, to use the language of Bayley J. (2), these several trials constituted one entire proceeding. Abbott C.J., as he then was, knowing that the evidence in each trial would be very much the same, and

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(1) 4 B. &amp; Ald. 218.

(2) *Ibid.* p. 229.

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fearing that if a report of each trial were published in the Press as it took place an opportunity would be given to the witnesses to trim their evidence, to the sacrifice, perhaps, of truth and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials had concluded.

A report of the trials of Thistlewood and another who had been convicted was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of Court in having acted "contrary to the order of this Court, and to the obstruction of public justice," not merely the first. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings taking place in a public Court of justice after these proceedings had terminated, and it was successfully defended on the ground that all the trials formed together one entire proceeding, and that Clement's newspaper was published in the middle, and not at the end of that proceeding.

Bayley J. (1) is reported to have expressed himself thus: "But, it is argued, that if the Court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed." And Holroyd J., the only other judge who gave at length reasons for his decision, is (2) reported to have said: "The object for which it (the order) was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. . . . It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is,

(1) 4 B. & Ald. at p. 230.

(2) Ibid. at pp. 232, 233.

as I understand it, this: that if a superior Court or a judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of Court. Even though the first proposition put forward by the respondent should, contrary to my view, be held to be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner, in sending at the time she did copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the Court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of Court does not appear to me, however, to fall within any of the classes of criminal contempt of Court mentioned by Lord Hardwicke in *Roach v. Garvan* (1), or by Lord Cottenham in *Lechmere Charlton's Case* (2), or by Lord Blackburn in *Skipworth's Case*. (3) It did not involve the scandalizing of a judge, such as was dealt with in *McLeod v. St. Aubyn* (4) or in *Reg. v. Gray*. (5) It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit, such as was attempted in *O'Shea v. O'Shea and Parnell*. (6) Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of Court, that men or women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong nullity suits are designed to redress, rather

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(1) (1742) 2 Atk. 469, at pp. 471, 472.

(2) (1836) 2 My. & Cr. 316, at p. 342.

(3) (1873) L. R. 9 Q. B. 230, at pp. 232, 233.

(4) [1899] A. C. 549.

(5) [1900] 2 Q. B. 36.

(6) 15 P. D. 59.



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than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a Court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course, if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result seems necessarily to follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this, his second proposition: *Lord Wellesley v. Earl of Mornington* (1), *Seaward v. Paterson* (2), *Avory v. Andrews* (3), and *In re Freston*. (4)

It was contended that these cases shew that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they shew I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all

(1) 11 Beav. 181.

(2) [1897] 1 Ch. 545.

(3) (1882) 30 W. R. 564.

(4) 11 Q. B. D. 545.

prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal to commit the forbidden act. The disrespect to the Court which made the order that was disobeyed, and the defiance of its authority, would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice if that resulted would probably be the same in both. It can hardly be that the fact that the principal was named in the order he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated? In the first of the before-mentioned cases, one Batley, the unnamed aider and abettor of the named principal who disobeyed the order of the Court, submitted, when brought before the Court, to answer for his contempt. The plaintiff in the suit did not press for punishment. The Master of the Rolls said that had he been pressed it would have been his duty to commit Batley, but he does not say for what form of contempt of Court, whether the civil contempt of Court for which the principal was found to have been guilty, or a criminal contempt of Court. The case is rather a blind one, therefore, on this point as to the nature of the contempt.

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In *Seaward v. Paterson* (1), a case much relied upon by the respondent, the principal, Paterson, his agents and servants were restrained by injunction from, amongst other things, having, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held there, such an exhibition in breach of this injunction. One Murray, who was neither his agent nor servant, was present at the exhibition, aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before North J. was whether Murray could be committed, as he was not a party to the suits, and was

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not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of Court in aiding and abetting Paterson in doing an act which the latter was by the injunction prohibited from doing, and committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from upheld, but neither on the hearing before North J. nor in the Court of Appeal was it ever suggested that Murray's contempt of Court was a criminal contempt of Court. Sect. 47 of the Judicature Act of 1873 was not referred to. The points discussed were those raised in the Court below. Lord Lindley is, at p. 555, reported to have expressed himself thus: "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls." The motive and object of the person who brings the offender before the Court may be different in the one case from the other. That, however, one would think could not change the nature of the offence. Lord Lindley did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not

becoming a criminal. It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either, or both, of the kinds of contempt of Court with which he dealt was necessarily criminal, if he had so regarded it.

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In *Avory v. Andrews* (1) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned, and new trustees were appointed in their stead. These latter did the prohibited act. Kay J. held they were guilty of contempt of Court because, though not named in the injunction, they stepped into the place of those who were named and did what the former were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of Court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the new trustees, though not the old ones, were guilty of a criminal offence.

In the case of *In re Freston* (2) a solicitor (Freston) was, by an order of the Court of which he was an officer, required to deliver up certain documents, and also pay to a person named a sum of 10*l.* and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10*l.* or the costs. Thereupon Denman J. made an order that an attachment should issue against him, and he was arrested while he was returning home from the police office, where he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench Division refused this application. Thereupon Freston appealed to the Court of Appeal. In this case, as in that of *Seaward v. Paterson* (3), the appeal was entertained. It was not suggested that under s. 47 of the Judicature Act the Court of Appeal had no power to hear the appeal. Lord Esher, at p. 554 of the report, lays down that where an attachment is issued for a breach of the law, or as a remedy for something that

(1) 30 W. R. 564.

(2) 11 Q. B. D. 545.

(3) [1897] 1 Ch. 545.



H. L. (E.) is a breach of the law and in the nature of an offence, no privilege can be claimed, but where it is issued for the purpose of enforcing judgments in civil disputes, and where the breach of the order cannot be said to be an offence, the privilege can be claimed. He apparently relied much on the 4th sub-section of the Debtors Act of 1869 and s. 1 of the Debtors Act of 1878, and came to the conclusion that Freston's contempt was in the nature of an offence, but whether or not this was because of the disciplinary jurisdiction which Courts exercise over solicitors as their own officers it is rather difficult to discover. Later on the same page he says: "The rights of those employing solicitors are not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law."

Lord Lindley, at p. 556, says, "Is this attachment simply in the nature of civil process? If it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale L.C. has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, sub-s. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process." And Fry L.J., at p. 557, says, "The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer." The appeal was dismissed.

There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of Court. Nothing

(1) (1803) 1 Sch. & Lef. 169, at p. 174.

would have been easier for the members of the Court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary. Some reliance was, in argument, placed upon authorities not cited in the Court of Appeal, such as *Reg. v. Ferrall* (1), to shew that the disobedience of an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell on Crimes, 7th ed., vol. 1, p. 543, and Chitty's Criminal Law, 2nd ed., vol. 2, p. 279, and are all collected in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex v. Robinson* (2) Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex v. Bristow* (3) is to a similar effect. In *Rex v. Johnson* (4) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *Rex v. Jeyes*. (5)

The observations of Pollock C.B. in giving judgment in *Reg. v. Ferrall* (6) are very significant. He says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel

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(1) (1850) 2 Den. C. C. 51.

(4) (1816) 4 M. &amp; S. 515.

(2) (1759) 2 Burr. 799, at p. 804.

(5) (1835) 3 Ad. &amp; E. 416.

(3) (1795) 6 T. R. 168.

(6) 2 Den. C. C. at p. 56.

H. L. (E.) bound by the authorities to concur with the rest of the Court in this view of the law.”

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This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made *inter partes* in civil suits, such as orders to hear a civil cause in camera, and do not support in any way, in my view, the respondent's second proposition. In my opinion that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case at p. 268 of the report, lays down in the following passage what, in my opinion, is the true and sound principle of the law. “It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal.” This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of Court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these cases act as the representatives of the Sovereign as *parens patriæ*, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter. Even if it be assumed that the Ecclesiastical Courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the Court for Divorce and Matrimonial Causes,

according to the provisions of the 22nd section of the Matrimonial Causes Act of 1857, subject to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations" not "rules and orders" are used in the 46th and 67th sections. I think these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of the 46th section operate directly with their full force and effect on suits of this character. And it certainly appears to me that the hearing of these suits in camera is opposed not only to the policy of this statute, but is prohibited by the express and positive enactments of its 46th section. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

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It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D. v. D.* (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon every one touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal



H. L. (E.) and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject.

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Even if the party aggrieved might be able to obtain from the Court that made the order permission to violate it to the extent necessary to prosecute the appeal, the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and, possibly, from that Court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of the 47th section of the Judicature Act. If a certain act may be viewed in either of two aspects, the one criminal and the other simply tortious, it is, I think, essential, in order to bring a judgment or order dealing with it within this section, that it should clearly appear on the face of the judgment or order that the act is dealt with in its criminal, and not in its civil, aspect. Were it otherwise a judgment for damages in a case of wilful and deliberate assault could not be reviewed by a Court of Appeal since wilful assault is a crime. Now Lindley L.J., in *O'Shea v. O'Shea and Parnell* (1), is reported as having expressed himself thus: "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order but by attachment. We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies." To accuse one, therefore, of being guilty of a contempt of Court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of Court.

In this case the order alleged to have been disobeyed was

(1) 15 P. D. 59, at p. 64.

simply an order "that the cause should be heard in camera," nothing more. If one turns to the notice of November 23, 1911, of the motion upon which the order appealed from was made, it is obvious that the person who framed it never thought he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea v. O'Shea and Parnell* (1), in order to shew that it dealt, to use the words of Lopes L.J., with something outside the cause, and was not a mere step in the cause. On the contrary it is entitled just as any notice of a motion which was a step in the cause would be entitled. The charge made was that the petitioner (a party to the suit bound by the orders made in it) and her solicitor (over whom as an officer of the Court the judge had disciplinary powers) had been guilty of contempt of Court in publishing a transcript of the shorthand writer's notes of the medical evidence in contradiction of the order of February 11, 1911, directing the cause to be heard in camera. The relief prayed for is, in substance, this: (1.) That the petitioner and her solicitor should be committed to prison; (2.) that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; (3.) that they should be restrained from molesting in this or in any other way the respondent and friends, doctors, patients, or others (the others not being identified in any way); (4.) that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications.

All these different kinds of relief might possibly be rightly and rationally asked for (I express no opinion upon that point) if what was complained of was a civil contempt of Court, like the mere breach of an injunction, but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Who ever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though

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similar crime, not to speak of a criminal having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognizances to keep the peace and be of good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that Bargrave Deane J. should have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no allusion to the absurdities of the notice of motion. The curial part of his order runs thus: "The judge found that the petitioner and her solicitor had been guilty of contempt of Court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the costs of this application." But of what kind of contempt, civil or criminal, he has found them to have been guilty the order does not disclose.

In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of Court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit it was competent for the learned judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have had entitled his own order in conformity with the amended notice, but he has not done so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, "of ambiguous meaning," according to Lord Lindley. It runs thus:

"It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of Court when the Court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in the private room. It must be understood in future

that anything done in chambers is private. Even summonses are not reported without leave of the Court when there is something important." (1)

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It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence shall be enjoined in the one class of cases as well as in the other.

I concur, therefore, with Vaughan Williams L.J. in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of the 47th section of the Judicature Act of 1873, and for this, as well as for the other reasons I have mentioned, am of opinion that this appeal should be allowed, with costs.

I am further of opinion that the decision of Bargrave Deane J. was erroneous, and that, as your Lordships have now before you all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal, namely, an order that the order appealed from to the Court of Appeal be set aside and vacated, and the applicant be ordered to pay the costs of the motion to commit the petitioner to prison, and also the costs in the Court of Appeal and the costs of this appeal.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On January 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was pronounced, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera."

(1) This passage appears in a Deane J. in the *Law Reports*.  
somewhat different form in the (2) Read by Lord Atkinson.  
report of the judgment of Bargrave



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Thereafter the respondent withdrew an answer which he had put in to the case—which accordingly proceeded undefended. The evidence was given and the hearing took place in camera, and on June 13, 1911, the President pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed.

Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with a view to vindicate herself in the eyes of those persons, and to prevent their being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, or that the report of the proceedings was true.

The respondent founds upon this action by the appellant as a contempt of Court, and in his notice of motion for December 4, 1911, he asks that the appellant, Annie Maria Scott, and her solicitor, Mr. Perey Braby, and his partner, Mr. Waller (who on her instructions had obtained the copies of the proceedings), be committed to prison for their contempt of Court; secondly, that they be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause," and, thirdly, "from otherwise molesting the respondent, his relatives and friends, doctors, patients, and others"; while fourthly, he moves that the appellants "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These

and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to this House is brought.

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But the argument before your Lordships was not confined to this point of competency—of civil or criminal; it ranged over the whole merits of the occurrence and was full and elaborate; it included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the Court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard *in camera*? In the second place, was that order itself properly and legitimately pronounced? Both of these matters, my Lords, appear to me to be deserving of grave and serious consideration. And I observe of both, but particularly of the latter, that I think them to be closely connected with questions of the deepest import affecting the powers of Courts of justice and the liberty of the subjects of the Crown.

After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English Courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of justice with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination in the first place of the power of the old Ecclesiastical Courts, as to which I humbly think that much misapprehension has prevailed.

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My Lords, the forms of the old Ecclesiastical Courts were manifestly derived from those in use under the general body of canon law, which, as Stair expresses it in a passage adopted by the Ecclesiastical Commissioners of 1832, "extended to all persons and things belonging to the Roman Church, and separate from the Laity; to all things relating to pious uses; to the guardianship of orphans; the wills of defuncts; and matters of marriage and divorce; all which were exempted from the civil authority of the Sovereigns, who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which Church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected."

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiry into the facts, not in *foro contentioso* nor in *foro aperto*, but by way of obtaining, first from the one side, and then, if there was a denial or a counter case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in *retentis* until, according to modern ideas, the real trial of the case should begin.

The true meaning of these preliminary inquiries was substantially this, that the story of each side was told without either the fear or the presence of the other, and without the knowledge or the desire to evade or mitigate the force of opposing evidence. They constituted an official precognition; I think they are referred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge. (1)

The true question to be determined as to the procedure of the

(1) [Such was also the course of the old Court of Chancery, which was founded on the "summary" ecclesiastical procedure.—F. P.]

Ecclesiastical Courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the Ecclesiastical Courts conducted their proceedings openly, and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret.

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These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, not as observations made in *judicio* but rather in *testimonio*. It was said that when Lord Penzance, Sir James Hannen, and Sir Francis Jeune made allusions to the old practice of the Ecclesiastical Court, they may have felt justified in their language by their own recollections. There is force in this view; although, of course, it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the Ecclesiastical Court. Its procedure is detailed with the utmost minuteness in Oughton's "*Ordo Judiciorum*," published in London in 1738; and it will be found from such a text-book that no support can be obtained for the view that subsequent to the stage of "publication" to which I have referred, the Ecclesiastical Courts, either as a matter of practice or in the exercise of a power, acted as secret tribunals.

But it is in truth unnecessary to go through the text-books—Conset and the others; because testimony of the greatest weight on this topic is obtained from the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in 1832. The personnel of the Commission gives this unanimous report the highest authority. For, in addition to the Archbishop of Canterbury and several members of the Episcopal Bench, the Commission included Lord Tenterden, Lord Wynford, and Chief Justice Tindal, together with other men



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The course of proceeding of the Ecclesiastical Courts is dealt with in detail, including the mode of taking evidence by depositions, and the examination and cross-examination of witnesses by the examiners of the Court, who were employed for that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows :—

“The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge ; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly, in open Court ; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument ; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

“The judgment of the Court is then pronounced upon the law and facts of the case ; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact ; and thus the matter in controversy between the parties becomes adjudged. Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the Courts of Westminster Hall ; but for the last twenty years and upwards, the judgments of these Courts have been regularly reported. These reports are not only useful in the jurisdiction itself, and the inferior Courts, but they also serve to explain to the Temporal Courts the principles of ecclesiastical decisions, so as to enable them to form a more correct

judgment of the proceedings, when they may have occasion to refer to them."

My Lords, accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact.

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This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and contra.

And so far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a Court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of Court continued to instruct the world.

My Lords, I am aware that the view which I now put forward as to the old practice and power of the Ecclesiastical Courts is not shared to the full by the judges of the Court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think the state of matters when the Divorce and Matrimonial Causes Act of 1857 became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all possibility sometimes by a

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feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law.

By s. 22 of the statute of 1857 it was provided, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." My Lords, there is nothing in that section which sanctions the idea that the Ecclesiastical Court had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners representing the Court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal.

The new Court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, my Lords, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory

section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by a statute declared to be in open Court throughout.

I may observe that, although the law and practice of Scotland are far less dependent on statute than in England, yet in the particular under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in the year 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rapt, adultery, and the like."

And, my Lords, in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests.

As to the Act of 1857, my Lords, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For if the view which I have taken be correct, namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of *litis contestatio* is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

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I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott v. Scott* was heard in camera. All interruption or impediment either to the elucidation of truth, or the dignity or decorum of the proceedings,—conceived to be possible by the presence of the public—had been avoided. The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what transpired in Court by exhibiting an accurate transcript of what had actually occurred, and the appellants are enjoined to perpetual silence. And against this—which is a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy—there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceeding shocks me. I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather,—for it is in nearly all the instances only so,—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved

under, and have accorded with, the genius and practice of H. L. (E.) despotism.

What has happened is a usurpation-- a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure,

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H. L. (E.) and at the instance of judges themselves. I must say frankly  
 1913 that I think these encroachments have taken place by way of  
 SCOTT judicial procedure in such a way as, insensibly at first, but now  
 v. culminating in this decision most sensibly, to impair the rights,  
 SCOTT. safety, and freedom of the citizen and the open administration  
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To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnett v. Barnett* (1) and of *H. (falsely called C.) v. C.* (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The cause came on for hearing before the Full Court, namely, Sir Cresswell Cresswell, the Judge Ordinary, Williams J., and Bramwell B. The judgment of Bramwell B. was conclusive, none the less so that he indicates that he knew already that the practice, which he was condemning as illegal, was already creeping in. The learned judge said: "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power."

My Lords, I think it would have been better had those

(1) 29 L. J. (P. & M.) 28.

(2) 29 L. J. (P. & M.) 29.

attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B. been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C. v. C.* (1), in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. (2) It is clear that that learned judge was much exercised upon the subject; for, having cited the judgments of Sir Cresswell Cresswell and Williams J. and Bramwell B., to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned judge adds: "It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned." I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already alluded, namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the later case in 1876 (3) even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases

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(1) L. R. 1 P. &amp; M. 640.

(2) *A. v. A.*, L. R. 3 P. & M. 230.(3) *Nagle-Gillman v. Christopher*, 4 Ch. D. 173.



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where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude.

But in the year 1903, in *D. v. D.* (1), Sir Francis Jeune brought these dicta to this culmination: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private." My Lords, I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan v. Young*. (2) By this time undoubtedly the occasional usurpation—for I call it no less—by the Courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice; and Denman J. held that he had power to hear the Sherborne School case in camera. Mr. Gould, a member of the Bar, objected to leave the Court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the Annual

(1) [1903] P. 144.

(2) 6 Times L. R. 38.

Practice of 1912:—"The following subsequent occurrence is, however, unreported:—The trial proceeded in camera on 11th, 12th, and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded note of the case)."

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The other case referred to was that of *Andrew v. Raeburn*. (1) But, my Lords, there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment Earl Cairns said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute," (a matter not of the rule but of an exception to the rule, as I shall hereafter explain) "I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." Thus far for the decision. But in a concluding sentence the learned Earl said, "Under these circumstances I do not think it would be right to deviate from what has undoubtedly been the practice of the Court—not to hear a case in private except with the consent of both parties." To infer from this sentence, not adopted or concurred in by either James L.J. or Sir John Mellish, that it was open to the judges of England to turn their Courts into secret tribunals, if both parties to any suits asked or consented to that being done, is to make an inference from which I feel certain that the noble Earl would himself have shrunk, and against which, indeed, my belief is that he

(1) L. R. 9 Ch. 522.

H. L. (E.) would have strongly protested. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the Constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

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My Lords, it is very necessary, indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. The case of *O'Shea* (1) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a Court of justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labours. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt: and a Court of justice can protect itself against these things both by suppression and by punishment.

But here, my Lords, the question affects not such a power, namely, to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these

cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as *parens patriæ*. The affairs are truly private affairs; the transactions are transactions truly *intra familiam*; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

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For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments, first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter

witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure: and it must further be remembered that, in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause.

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering

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H. L. (E.) 1913 the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

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My Lords, I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane J. was not pronounced in a criminal cause or matter. For, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in answer to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say it was indictable. My Lords, the breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day. But I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter. And in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was an order only that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper Court to try that was undoubtedly the Court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what, in an infringement of patent case or the like would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present.

I will only add that, if the respondent's argument and the judgment of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.

Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost.

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I concur.

*Sir John Simon, S.-G.*, asked whether in the peculiar circumstances of this case the House would not depart from its ordinary rule and allow the appeal without costs.

EARL OF HALSBURY, in moving that the order appealed from be reversed and that the respondent do pay the costs both here and below, said that in his opinion the ordinary order should be made, but intimated that that which was most properly done by the Treasury and by the Attorney-General ought not to be at the expense of the private parties, because the judgment had established a most important principle and one which it was most important the public should have the benefit of, and therefore private individuals should not be at the expense of establishing it.

*Order of the Court of Appeal reversed: the respondent to pay the costs in the Courts below and also the costs of the appeal to this House.*

*Lords' Journals, May 5, 1913.*

Solicitors for appellants: *Braby & Waller*.

Solicitors for respondent: *Treasury Solicitor (1) ; W. S. Jerome.*

#### ADDENDUM.

Mr. Harold Moore, of the Divorce Registry, during the course of the hearing in the House of Lords looked up the papers in the Registry in a number of nullity cases from 1820 to 1857. In a letter to the Treasury Solicitor he stated the result of his search as follows: "The papers in cases tried in the Consistory Court of London were handed over to the Probate and Divorce Court in the last-named year and we have an index of them. My search established the fact that it was the practice to hear such suits in camera and that informal application was made to the judge or his clerk by the proctors concerned either by letter or verbally. I think I found three letters—the cases are not very numerous—and in one instance where there was no letter there was a pencil note 'to be heard in the dining hall by order of the judge.'"

(1) The Treasury Solicitor was put on the record, after the appeal was presented, to enable him to instruct counsel.



[HOUSE OF LORDS.]

H. L. (Sc.)\*  
1913  
April 4,  
—

HANLEY. . . . . APPELLANT ;  
  
AND  
  
LORD PROVOST, &c. OF EDINBURGH . . RESPONDENTS.  
  
*Burgh—Drainage and Road Authority—Flooding—Natural Stream—Reparation—Negligence—Edinburgh Corporation Act, 1900 (63 & 64 Vict. c. cxxxviii.), s. 28.*

Interlocutor of the Second Division of the Court of Session in Scotland (1912 S. C. 1199) reversed, and interlocutor of the Lord Ordinary restored, on the facts.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary. (1)

The appellant, who was tenant of a market garden situate near Restalrig in an outlying district of the burgh of Edinburgh and forming part of the Craigentinnny estate, brought an action of damages against the respondents, as the road and drainage authority of the burgh, in respect of the flooding of his garden by the Craigentinnny burn. The Craigentinnny burn, which for a long period had carried part of the sewage of the burgh, flowed in an easterly direction through some flat meadow land until it reached the Restalrig Road, which was a public road under the control and management of the respondents. It then passed under the road through a culvert and flowed past the southern boundary of the appellant's garden. The garden was bounded on the west by the Restalrig Road, from which it was entered by a gate situate at the lowest point of the road, which rose rapidly on either side. The culvert had been partially blocked up by a

\* *Present*: VISCOUNT HALDANE L.C., LORD KINNEAR, and LORD SHAW OF DUNFERMLINE. LORD MERSEY was present during the argument but did not take part in the judgment.

(1) 1912 S. C. 1199,

water main inserted across the top of it by permission of the respondents as the road authority. The respondents were under a statutory obligation to provide adequate sewers for the efficient drainage of the burgh.

The case made by the appellant in fact was that on two occasions in 1909, when there was an exceptionally heavy rainfall, the Craigentenny burn became flooded, and that, owing to the insufficiency of the culvert to carry the water of the burn, it was dammed back on to the meadow land above, until it rose above the level of the road and rushed down the road through the appellant's gate into the garden, causing serious damage thereto.

The main defence to the action was that the flooding of the garden had not resulted from flood water flowing from the road through the entrance gate of the garden, but was caused by the burn below the culvert overflowing its banks; that when the district in question was taken into the burgh by the Edinburgh Corporation Act, 1900, a clause (s. 28) was inserted for the protection of the proprietors of the Craigentenny estate, forbidding the respondents to injuriously affect the irrigation of lands on the estate, or to interfere with the stream passing through the estate, except upon an order of the sheriff sanctioning such interference in the public interest; and that the respondents were absolved from liability by virtue of that section.

The evidence at the trial was conflicting.

The Lord Ordinary (Lord Ormidale) adopted the appellant's view of the facts and held the respondents liable to the appellant in damages.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Guthrie, and Lord Salvesen) differed from the Lord Ordinary upon the facts and held that the respondents were not liable either as road or drainage authority.

Feb. 13, 17, 18, 20, 1913. *Constable, K.C.*, and *W. Ingram* (with them *J. R. Marshall*) (all of the Scottish Bar), for the appellant.

*Scott Dickson, K.C.* (Dean of Faculty), and *W. J. Robertson* (both of the Scottish Bar), for the respondents.

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H. L. (Sc.).      The House, after consideration, reversed the interlocutor of  
1913      the Second Division upon the evidence and restored the  
HANLEY      interlocutor of the Lord Ordinary.

EDINBURGH  
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*Interlocutor of the Second Division of the Court  
of Session reversed and interlocutor of the  
Lord Ordinary restored. The respondents to  
pay the costs of the action in the Court of  
Session and of the appeal to this House.*

*Lords' Journals, April 4, 1913.*

Agents for appellant: *Morice Strobe & Son, for Daniel  
Tudhope, Solicitor, Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for Sir  
Thomas Hunter, W.S., Edinburgh.*

## [PRIVY COUNCIL.]

|                                                      |               |                                         |
|------------------------------------------------------|---------------|-----------------------------------------|
| LOKE YEW . . . . .                                   | DEFENDANT ;   | J. C.*                                  |
|                                                      | AND           | 1913                                    |
| PORT SWETTENHAM RUBBER COMPANY,<br>LIMITED . . . . . | } PLAINTIFFS. | Jan. 30, 31 ;<br>Feb. 25 ;<br>March 19. |

ON APPEAL FROM THE COURT OF APPEAL OF SELANGOR  
(FEDERATED MALAY STATES).

*Registration of Titles Regulation, 1891 (Reg. IV. of 1891, State of Selangor), s. 7—Fraud—Knowledge of Unregistered Rights—Rectification—Trustee—Specific Relief Enactment, 1893 (Enact. IX. of 1903), s. 3, Illustration (g).*

The Registration of Titles Regulation, 1891, provides for the registration of all titles to land in the State of Selangor, and by s. 7 provides that the title of the person named in the certificate of title issued thereunder shall be indefeasible except on the ground of fraud or misrepresentation or of adverse possession for the prescriptive period. In June, 1910, one Eusope was the registered owner of 322 acres of land in Selangor, as to 58 acres of which the appellant was in possession under unregistered Malay documents constituting him the owner subject to the payment of an annual rent to Eusope. The respondents, who had knowledge of the appellant's interest, bought from Eusope the 322 acres excepting the said 58 acres. A transfer of the whole 322 acres was prepared, and in order to induce Eusope to sign it the respondents' agent told him that if he did so the respondents would purchase the appellant's interest, and signed a document which stated "As regards Loke Yew's interest I shall have to make my own arrangements." Eusope thereupon signed the transfer. The respondents, having obtained thereunder registration of the entire 322 acres, called upon the appellant to give up possession of the 58 acres, and upon his failing to do so commenced an action, claiming possession thereof and damages. The appellant asked for rectification:—

*Held*, that the action should be dismissed and the respondents ordered to execute and register in the appellant's name a grant of the 58 acres subject to the rent reserved, on the grounds—

(1.) that, on the facts, the respondents obtained the transfer by fraud and misrepresentation.

(2.) That, apart from the exception in s. 7, as the rights of third parties did not intervene, the respondents could not better their position

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\* *Present*: LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON. LORD MACNAGHTEN, who was present on January 30 and 31, died on February 17.



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by obtaining registration under circumstances which made it not honest to do so, and that it was the duty of the Court to order rectification.

(3.) That under the Specific Relief Enactment, 1903, s. 3, the respondents having bought with notice of the appellant's rights were trustees for him in respect thereof.

APPEAL from an order (July 24, 1911) of the Court of Appeal of the State of Selangor (Federated Malay States) reversing an order (November 21, 1910) of the Court of the Judicial Commissioner at Kuala Lumpur.

The action was for ejectment and to recover possession of certain land in Selangor. The land in dispute consisted of about fifty-eight acres forming part of a block of 322 acres known as grant 675, which was on January 4, 1894, granted under the Selangor Land Code, 1891, to Haji Mohamed Eusope, "to hold for ever" subject to an annual rent of about 10 cents an acre to the Sultan of Selangor, his heirs and successors. This grant was registered under the provisions of the Registration of Titles Regulation, 1891 (Reg. IV. of 1891) (1), and Haji

(1) The following are the more material portions of the Registration of Titles Regulation, 1891:—

Sect. 4: "After the coming into operation of this regulation, all land which is comprised in any grant, whether issued prior or subsequent to the coming into operation of this regulation, shall be subject to this regulation, and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of none effect."

Sect. 7: "The duplicate certificate of title issued by the registrar to any purchaser of land upon a genuine transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprie-

tor of the land is the absolute and indefeasible owner thereof, subject to the conditions and agreements expressed or implied in the original grant, and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party, or on the ground of adverse possession in another for the prescriptive period."

Sect. 21: "Except as is hereinafter otherwise provided . . . instruments registered in respect of or affecting the same land shall notwithstanding any express implied or constructive notice be entitled to priority according to the date of registration and not according to the date of each instrument itself . . ."

Sect. 68: "Any person claiming to be interested under any will, settlement, or trust deed, or any instrument of transfer or transmission, or under any unregistered instrument, or otherwise howsoever in any land,

Mohamed Eusope was the registered owner of the whole 322 acres under that regulation. During 1895 and 1896 Eusope subdivided the 322 acres into allotments of from one to four acres and disposed of them to Malay cultivators at an increased annual rent. Each of these cultivators received from Eusope a document in the Malay language. The documents were all in the same form and gave to each cultivator an absolute right to enjoy the land for the period in the original grant, that is, for ever, subject to the payment of a rent of \$1.25 to the holder of the original grant. Between 1899 and 1909 the appellant, a Chinese, with the assent of Eusope purchased from the Malay cultivators fifteen of these allotments for a total sum of \$7716. From each cultivator the appellant received a document in the Malay language signed by the cultivator and by Eusope. These documents were all in the same form and referred to the allotment as being sold by the cultivator to the appellant and as forming part of the original grant. The appellant took possession of these fifteen allotments, which together made about fifty-eight acres and were the subject-matter of the litigation, and he duly paid the annual rents reserved to Eusope. No steps were taken to register any of the Malay documents under s. 7 or to protect them by caveat under s. 68 of the Registration of Titles Regulation, 1891.

In 1910 the respondents, who had knowledge of the transactions above referred to, opened negotiations with Eusope for the purchase of the whole 322 acres comprised in the original grant, and Eusope bought back from the Malay cultivators for about \$115,000 all the allotments except the fifteen held by the appellant and seven further acres which had been acquired by a Chinese partnership called Sz Woh Kongsì.

may lodge a caveat with the registrar to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed, or until notice shall have been served on the caveator or unless the instrument of disposition be expressed to be subject to the

claim of the caveator as may be required in such caveat, or to any conditions conformable to law expressed therein. . . ."

Sect. 86: "Nothing contained in this regulation shall take away or affect the jurisdiction of the Court on the ground of actual fraud."

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Early in June, 1910, the respondents agreed to purchase from Eusope the whole of the 322 acres, except the appellant's fifty-eight acres, for \$350,000, and on June 4 the representatives of the appellant and of the respondents met to complete the sale. It was agreed that out of the price \$14,000 should be retained, being an amount agreed to be accepted by the Chinese partnership in respect of their seven acres, payment thereof being deferred till the conclusion of litigation between the members of the partnership.

The respondents' local solicitors had prepared a transfer purporting to transfer the whole 322 acres without exception to the respondents' trustees; this Eusope refused to sign unless he received an agreement on the part of the respondents not to disturb the appellant in his possession. Mr. Glass, the respondents' agent, assured Eusope that he need not be afraid, as he would purchase the appellant's interest. Eusope, however, pressed for something in writing, and Mr. Glass signed a document to the effect that he had purchased the land comprised in grant 675, adding, "as regards Loke Yew (the appellant) and Kongsí's land which is included in the said grant I shall have to make my own arrangements." Their Lordships found that this was a statement of a present intention and was false and fraudulently made for the purpose of inducing Eusope to execute a transfer of the whole 322 acres comprised in the grant.

Upon receipt of this document Eusope signed a formal transfer in the statutory form required by the Registration of Titles Regulation, 1891, for the whole 322 acres comprised in the grant. This transfer was to Glass, and was shortly afterwards registered. Subsequently Glass transferred the land to the respondents, who registered the transfer. No duplicate certificate under the Registration of Titles Regulation, 1891, s. 7, was issued to the respondents, but a memorial under s. 28 was indorsed upon the original grant to Eusope. On June 22, 1910, the respondents' solicitors wrote to the appellant a letter in which, while not admitting that the appellant had any rights in the fifty-eight acres, they offered him \$20,000 for the surrender of any rights which he claimed. This offer was declined. On August 18, 1910, the respondents gave the appellant notice to quit the land, and on

August 29, 1910, the appellant commenced proceedings under s. 72 of the Registration of Titles Regulation, 1891, for the purpose of having the respondents' documents of title to the 322 acres rectified by excluding therefrom the fifty-eight acres now in dispute. The progress of this suit was stayed pending the decision of the present appeal.

On August 24, 1910, the respondents commenced the present suit, alleging that they were registered owners of the whole 322 acres and claiming possession and damages. The appellant by his defence claimed title to occupy the land in dispute by virtue of the Malay documents and pleaded that the respondents had taken their transfer with full knowledge of the appellant's title and rights and that their conduct amounted to fraud within the Registration of Titles Regulation, 1891, s. 7. He also claimed that the respondents' registered title should be rectified and that the land in dispute should be assured to him by a proper registered transfer. The appellant also pleaded that the suit was barred by the Limitation Enactment, 1896, but the decision of this point became unnecessary and the arguments thereon are omitted from this report.

The action was heard by the Judicial Commissioner on September 21, 22, and 23, 1910, and on November 21, 1910, he gave judgment dismissing the respondents' suit and ordering that they, on the footing of being trustees for the appellant, should execute and register in his favour a grant of the fifty-eight acres in dispute subject to the annual rent reserved. The Judicial Commissioner found (and it was admitted) that the respondents took their transfers with actual notice of the appellant's rights; he also found that they paid nothing in respect of the fifty-eight acres in dispute. He was of opinion that the respondents did not gain an indefeasible title under the Registration of Titles Regulation, 1891, s. 7, as the probative force of a memorial of transfer entered upon the registered grant under s. 28 was not the same as an actual certificate of title under s. 7, and that accordingly it was not necessary to find fraud within the latter section in order to avoid the respondents' title. He further held that s. 4 did not render the Malay documents nullities, but only prevented their operation as legal transfers, and that they

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were contracts which could be enforced against the respondents, who had purchased with notice.

Notices of appeal and of cross-appeal were given. The appeal and cross-appeal were heard by the Court of Appeal of Selangor, and on July 24, 1911, judgment was given allowing the respondents' appeal, and an order was made for possession of the land in dispute and for an inquiry as to damages. The learned judges of that Court adopted the findings of fact of the Judicial Commissioner, but differed from him as to the effect of the indorsement of a memorial under s. 28, which they held was as effectual to give an indefeasible title as a certificate under s. 7, and they further held that the Malay documents were absolute nullities and conferred no right or interest upon the appellant of which he could be deprived by fraud or otherwise.

Buckmaster, K.C., and *Alfred Adams*, for the appellant. It is only a certificate of title which, under the Registration of Titles Regulation, s. 7, carries a title indefeasible except in the case of fraud or adverse possession for the prescriptive period. There is no provision that a memorial under s. 28 has the same effect, and it was not necessary for the appellant to prove fraud. If, however, s. 7 is to be taken as applying to a memorial as well as to a certificate, the evidence shews that there was fraud within the meaning of that section, as well as "actual fraud" within s. 86. The respondents' agent obtained the transfer of the entire 322 acres by a representation, both verbal and in writing, the effect of which was that there was an intention to settle with the appellant in respect of his interest. The inference to be drawn from the evidence is that there was not any such intention and that the statement was fraudulently made for the purpose of obtaining a transfer of the whole 322 acres. But apart from this the conduct of the respondents in registering the transfer with knowledge of the appellant's rights was fraud within s. 7 of the Regulation. Similar conduct is described by Lord Hardwicke in *Le Neve v. Le Neve* (1) as "a species of fraud and dolus malus itself," and it was so held with regard to the registration of a

(1) (1747) Amb. 436 (a); 2 W. & T. L. C. (8th ed.) at p. 196.

deed in Natal in *Crowly v. Bergtheil*. (1) The decision in *Assets Co. v. Mere Roihi* (2) is not applicable, the registration being obtained in that case bona fide, and no question arose as to registration with knowledge of an outstanding title. In various colonies in which there are provisions for registration of title there has been a conflict of judicial authority upon this point: see Hogg's *Australian Torrens System*, 1905, p. 806. The Malay instruments cannot be treated as nullities. Though ineffectual as transfers for want of registration, the law will give effect to them as contracts: *Shep. Touch.*, c. 24, p. 514; *Mouys v. Leake* (3); *Parker v. Taswell* (4); *Tailby v. Official Receiver* (5); as to the effect of part performance upon an unregistered transfer see *White v. Neaylon*. (6) They are enforceable against the respondents, who purchased with knowledge and subject to the appellant's rights thereunder. Under the Specific Relief Enactment, 1903, s. 3, Illustration (g), the respondents, having notice, became trustees for the appellant, and they can be ordered to give effect to the rights of their cestui que trust. The intention of the Malay grants can be carried out by registered instruments in accordance with the Regulation. Sects. 7 and 25 shew that a transfer may be made subject to agreements or conditions on the part of the transferee, and this includes an agreement to pay a rent-charge.

Uppjohn, K.C., and *Sargant*, for the respondents. The effect of a memorial under s. 28 is the same as that of a certificate under s. 7, and that section must be so read. It is at the option of the registrar whether he shall issue a certificate or merely indorse a memorial, and it cannot be that the character of the title differs according to which course he adopts. The respondents have therefore under s. 7 a title indefeasible except on the ground of fraud or continued adverse possession. There was no fraud. The respondents purchased subject to the appellant's rights so far only as they were enforceable rights. Fraud cannot be attributed to a purchaser because he disregards a

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(1) [1899] A. C. 374.

(4) (1858) 2 De G. & J. 559.

(2) [1905] A. C. 177.

(5) (1888) 13 App. Cas. 523, at

(3) (1799) 8 T. R. 411, at p. 415. p. 543.

(6) (1886) 11 App. Cas. 171.

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claim which is unenforceable and based on a nullity, as the appellant's claim was, having regard to ss. 7 and 25 of the Regulation. So far as the Malay instruments gave the appellant any rights in law it was in contract against Eusope; his only possible right against the respondents is a right in equity. As appears, however, from a review of the Registration of Titles Regulation, 1891, and especially from s. 68, under which a caveat could have been entered, the intention of the Legislature was to exclude those equitable rights to which effect would be given in English law as against a purchaser with notice: *Assets Co. v. Mere Roihi*. (1) Sect. 21 of the Regulation provides that priority between registered titles is to be according to the date of registration notwithstanding any notice, and it is a fortiori as between a registered and an unregistered title. Registration of title with actual notice does not necessarily involve fraud: *Battison v. Hobson*. (2) No relief can be given in equity against a legal invalidity which is caused by direct and positive statutory enactment: *Edwards v. Edwards* (3); *London and South Western Ry. Co. v. Gomm*. (4) The appellant is not entitled to any relief against the respondents under the Specific Relief Enactment, 1903, because his interest being unregistered is not enforceable. Where, as here, the alleged cestui que trust is a rival claimant who can prove no trust apart from his own alleged ownership, to treat him as a cestui que trust would be to destroy all benefit from registration: *Assets Co. v. Mere Roihi*. (5) Sect. 3, Illustration (g), of the Enactment is subject to s. 4, which expressly preserves the application of the law as to registration of title.

Buckmaster, K.C., in reply.

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The judgment of their Lordships was delivered by
LORD MOULTON. This is an action of ejectment brought by the Port Swettenham Rubber Company, Limited, against Loke Yew to recover possession of a piece of land situated in the State of Selangor. The statement of plaint alleges that the plaintiff company is the registered owner of the land, that there is no

(1) [1905] A. C. 177.

(3) (1876) 2 Ch. D. 291.

(2) [1906] 2 Ch. 403.

(4) (1882) 20 Ch. D. 562.

(5) [1905] A. C. at p. 204.

incumbrance upon it, and that the defendant has no title to occupy it. It admits that the defendant is in fact in occupation, but alleges notice to quit and refusal by the defendant to go out. The statement of defence alleges title in the defendant, and that the registered title of the plaintiffs was obtained by fraud, and also pleads possession for twelve years before the commencement of the suit, so that the plaintiff's right of action is barred by the Limitation Enactment V. of 1896. The meaning and significance of the allegations in the defence can only be understood by a reference to the history of the land in question and the transactions relating to it.

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On January 4, 1894, the Resident of Selangor under and by virtue of the power conferred upon him by the Selangor Land Code, 1891, in the name and on behalf of the Sultan of Selangor, made a grant of a piece of land in Kland, containing about 323 acres, to Haji Mohamed Eusope. The consideration for the grant was the sum of \$323, and an annual rent. The terms of the grant were: "To hold for ever, subject to the payment to his said Highness, his heirs and successors, therefor of the annual rent of thirty-two dollars and thirty cents, and to the provisions and agreements contained in the said Code."

Haji Mohamed Eusope having obtained the grant proceeded to dispose of portions of the land comprised in it to cultivators, who seem to have laboured the land and brought it under cultivation. The documents effecting the transactions in each case are in the Malay language, and are all in the same form. Taking, for example, the one exhibited in the action, namely, the transfer of about $4\frac{1}{2}$ acres to Yeop Sow San, the operative words (as translated) are as follows: "Now I have truly given to Yeop Sow San the right to hold a portion of the said land on the same conditions that I hold it from the Government of Selangor—Yeop Sow San obtains from me the right to hold the land on the same condition, that is, he can sell it, he can mortgage it, and he can bequeath it to his heirs for the period mentioned in the big grant, that is — years. But during the said period, Yeop Sow San, or whoever, after him, having the right to hold the land by purchase or otherwise, must pay rent to me or, after me, to whomsoever that obtains the

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Although this grant may not be in a form such as would be used by skilled conveyancers, its language is clear, and their Lordships have no doubt as to its meaning or effect. It is perhaps best described as a sub-infeudation. The owner of the head grant parts with the whole of his interest in the specified portion of the land for a payment of money, and an annual rent or feu. There is no reversion, because the grant is for the same period as the head grant, i.e., is a grant in perpetuity. Had this instrument been registered, it would thereupon have given to the grantee the whole of the interest in the specified land possessed by the holder of the head grant, and thus would have effectively carved out of the land included in the original grant the portion covered by the derivative grant. But owing to the provisions of Regulation 4 of 1891, which is entitled "A Regulation to provide for the Transfer of Land by Registration of Title," no instrument is effective to convey any estate in land unless it is registered, and therefore the effect of the instrument rested in contract until registration.

At various dates in and between December, 1906, and January, 1909, the defendant Loke Yew purchased fifteen of these sub-grants from their owners, and thus became possessed of an area of about fifty-eight acres of land, comprised in the original grant. Certain other portions were acquired by a Chinese partnership called Sz Woh Kongsí. Other sub-grants of portions of the land were also created by Haji Mohamed Eusope, but as these were subsequently bought back by him for a sum of about \$114,000, prior to the transaction between him and the plaintiff company about to be referred to, there is no need to make any further reference to them.

In the year 1910 the plaintiff company formed the project of acquiring the land included in the grant to Haji Mohamed Eusope, and commenced negotiations with him for that purpose. They had full knowledge of all the transactions above referred to. For the purpose of the sale he purchased back all his sub-grants with the exception of those in the hands of the defendant Loke Yew and the Sz Woh Kongsí. He sought to acquire in the

same way those that were in the hands of the defendant, but the defendant refused to part with his grants. The Sz Woh Kongs, on the other hand, were willing to sell their grants for \$14,000—the only difficulty being that, by reason of a lawsuit among the members of the partnership, it was uncertain in what proportions and to what members of the partnership that \$14,000 would eventually be distributed. The difficulty was met, as will presently be seen, by an allowance of the \$14,000 out of the price paid by the plaintiff company—they holding the sum so retained by them for the purpose of distribution among the members of the Sz Woh Kongs so soon as the shares should have been ascertained in the litigation.

The negotiations between the plaintiff company and Haji Mohamed Eusope were carried on by a certain Mr. Glass as agent on behalf of the company. The evidence shews that Haji Mohamed Eusope recognized throughout that he had parted with his interest in the Loke Yew lands (excepting the right to receive the annual payments or feus), and that it was arranged originally that the conveyance to the plaintiff company should not include Loke Yew's land. The price excluding that land was fixed at \$350,000. The deed of conveyance, however, purported to convey the original grant in its entirety. Haji Mohamed Eusope, who appears to have acted honestly throughout, refused to sign that conveyance without a document shewing that he was not selling Loke Yew's land, and originally a lengthy document to that effect was drawn up for him by a conveyancer, which he asked Mr. Glass to sign. This document, however, Mr. Glass refused to sign, apparently because of objections taken to it by the representative of the bank who was in charge of the money to be paid as the purchase price. But Haji Mohamed Eusope would not proceed without an assurance that the lands of Loke Yew and Sz Woh Kongs were not included in the sale. Mr. Glass then replied that he need not be afraid, as he knew Loke Yew, and would purchase his interest.

Haji Mohamed Eusope required, however, something in writing, and accordingly the following document was written out and signed by Mr. Glass:—

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"To Haji Mohamed Eusop bin Abubakar.

"I have purchased the land comprised in Grant No. 675 of Mukin Klang in the District of Klang for the sum of \$336,000.

"As regards Loke Yew and See Oh Kongsee's land which is included in the said grant I shall have to make my own arrangements.

"Kuala Lumpur.

4th June 1910.

"(Signed) Philip J. Glass.

"Signed in the presence of

"(Signed) G. H. Day.

"Lease:

Nos. 1, 3, 4, 5, 6, 33,

36, 40, 42, 43, 50,

59, 82, 83, 84 & 2."

Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr. Glass to Haji Mohamed Eusope was intended to be and was a statement as to present intention as well as an undertaking with regard to the future, and that that statement was false and fraudulently made for the purpose of inducing Haji Mohamed Eusope to execute a conveyance which in form comprised the whole of the original grant, and that but for such fraudulent statement that conveyance would not have been executed. At that time it is evident that Mr. Glass intended to eject Loke Yew if he did not accept whatever sum he chose to offer, and that therefore he did not intend to purchase Loke Yew's rights. It is also clear that it was understood, and intended by Mr. Glass that it should be understood, that the document above set out was written (to use the words of one of the witnesses) "for the security of the vendor to shew that he was not selling Loke Yew's land," and their Lordships are of opinion that the document carries out that intention. The purchase price there mentioned of \$336,000 makes allowance for the \$14,000 to be paid for the land of Sz Woh Kongsi which is the last of the parcels noted in the margin and called therein "lease," the other fifteen being the numbers of the sub-grants held by Loke Yew. It is important in this connection to note that the purchase price inserted in the conveyance is \$417,000, shewing a difference of

\$67,000 when compared with the sum actually paid after allowing for the \$14,000 for the land of Sz Woh Kongsí. This corresponds closely with the plaintiff company's own estimate of \$70,000 as the value of Loke Yew's land which appears elsewhere in the suit. It is clear, therefore, from the amount actually paid that Loke Yew's lands were not included in the sale.

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Having thus possessed himself of a formal transfer of the original grant to himself as trustee for the Port Swettenham Rubber Company, Limited, Mr. Glass procured its registration, and thereupon the solicitors for the plaintiffs wrote to Loke Yew the following letter :—

“Kuala Lumpur, Selangor,
“Federated Malay States,
“22nd June 1910.

“Dear Sir,

“On behalf of the Port Swettenham Rubber Company, Limited, we are instructed to inform you that our clients have bought the land comprised in Grant 675, and we are further instructed to ask you to give directions to your coolies to cease from entering on this land and tapping the trees thereon. We are informed that you have an agreement of some nature with the former owner of this land, and that though our clients do not admit, and in fact deny, that you have any right against any person whatsoever under this agreement, yet to prevent any unpleasantness our clients are willing to pay you the sum of \$20,000 if you will surrender to them any rights you claim under the said agreement.

“Yours faithfully,
“Hewgill and Day.

“Towkay Loke Yew.”

and on the defendant's refusing to vacate the land the plaintiffs brought the present action for ejectment.

Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of Mr. Glass. He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it

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until the plaintiff company were able so to do honestly by having acquired Loke Yew's sub-grants by purchase, and he therefore fraudulently made such representation, and thereby obtained the execution of the transfer. It is an important fact to be borne in mind that although this fraud was clearly charged in the defence, Mr. Glass was not called at the trial, nor was his absence accounted for. The inference to be drawn from this is obvious and is entitled to great weight.

The case of the plaintiffs as argued before their Lordships rested mainly on the effect of registration. At the date of the writ the transfer to the plaintiffs was registered while the sub-grants of Haji Mohamed Eusope held by Loke Yew were not. Counsel for the plaintiffs therefore argued that under the provisions of the Registration of Titles Regulation the plaintiffs possessed an indefeasible title to the land, and that under the provisions of s. 4 all the sub-grants were "null and void and of none effect." A memorial of the transfer had been made upon the duplicate grant under the provisions of s. 28, and they contended that that was equivalent to a certificate of title under s. 6 and that by virtue of s. 7 this was "conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof."

The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception of s. 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a Court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him

to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do, and inasmuch as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances it cannot better the position of the plaintiffs as against the defendant and they cannot rely on it as against him when seeking to enforce rights which formally belong to them only by reason of their own fraud. It must be remembered that in the present case the defendant immediately on the bringing of the action applied to rectify the register and that such rectification only awaits the event of this suit. His right to it is set up in the defence, so that he has taken all the necessary steps to obtain the full relief to which he is entitled.

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There is, however, another ground upon which, in their Lordships' opinion, the defendant is entitled to succeed in this case. It is admitted that the plaintiff company bought with full knowledge of the transactions with regard to the land occupied by Loke Yew, so that they knew that Haji Mohamed Eusope had parted with his rights in that land. Under the provisions of s. 3 of Enactment No. 9 of 1903, entitled "An Enactment to define and amend the Law relating to certain kinds of Specific Relief," the plaintiff company became by the transfer trustees for Loke Yew in respect of that land. This is clear from Illustration (g) to that section, which reads as follows:—

"A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee within the meaning of this enactment for B. of the land so bought."

The present is an even stronger case, inasmuch as the plaintiff company through Glass, their trustee and agent in the transaction, were aware that Haji Mohamed Eusope had actually granted away these lands and been paid for them. The plaintiff company, therefore, are trustees for the defendant for all the rights of which they thus had notice. These rights amounted to

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the rights of a freeholder subject to an annual payment to the owner of the head grant. Now, it is clear that a cestui que trust has the right to require a trustee who is a bare trustee for him of land to register that land in his name, seeing that he is the sole beneficial owner and that the trustee has no interest therein. The present action from this point of view is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and is cultivating it.

It is not necessary for their Lordships to decide whether the defence of the Statute of Limitations is well founded or not, and therefore that question must be taken to be left open.

In the Court of the Judicial Commissioner at Kuala Lumpur, in which the action came on in the first instance, Braddell J. found in favour of the defendant with costs. On appeal to the Court of Appeal this was set aside. In their Lordships' opinion the appeal ought to have been dismissed. Their Lordships will therefore humbly advise His Majesty that the judgment of the Court of Appeal should be discharged with costs, and the judgment of the Court of first instance restored. The respondents must pay the costs of this appeal.

Solicitors for appellant : *Gush, Phillips, Walters & Williams.*

Solicitors for respondents : *Hallowes & Carter.*

[PRIVY COUNCIL.]

NATIONAL PROTECTOR FIRE INSURANCE }
 COMPANY, LIMITED } DEFENDANTS ;

AND

NIVERT PLAINTIFF.

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Feb. 26 ;
 March 13.

ON APPEAL FROM HIS MAJESTY'S SUPREME COURT FOR
 THE OTTOMAN DOMINIONS.

*Insurance (Fire)—Condition in Policy—Declaration of other Insurances—
 Substitution of Insurances for those declared.*

Under two policies in French the respondent insured against fire a building and its contents, each for 600*l*. The policies provided by Condition III. that if the property should be insured under other contracts, subscribed either before or after the policies attached, he was “tenu de le déclarer, par écrit, et de le faire mentionner soit dans la police même, soit par un endos inscrit par la compagnie sur la dite police.” The respondent had at the time of effecting the policies concurrent insurances with other companies for 600*l*. upon the building and 600*l*. upon the contents, and these insurances were recorded in the policies respectively. Subsequently the concurrent insurances were replaced by other insurances to a slightly larger amount, the excess being due to new decoration of the building and additions to the contents. These substituted insurances were not communicated to the appellants or indorsed on the policies :—

Held, that Condition III. in the policies meant only that the fact that the property covered was further insured should be declared, and that the respondent had committed no breach of the condition and was entitled to recover upon the policies.

APPEAL from a judgment (September 7, 1911) of His Majesty's Supreme Court for the Ottoman Dominions.

The respondent was the owner of a building at Smyrna which was used as a skating rink, and was also owner of certain furniture, machinery, and other contents of these premises.

The appellants issued to the respondent two policies against loss or damage by fire. The first, dated October 7, 1909, was for 600*l*. and was upon the building, excluding its foundation. The second, dated October 15, 1909, was also for 600*l*. and was upon

* *Present* : LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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the furniture and other contents of the building. Both policies were in the same printed form by which the liability of the appellants was expressed to be "en tenant compte toutefois des conditions au dos de la présente et qui font partie intégrale de cette police."

Condition III. of the policies provided as follows:—"Si tout ou partie des objets sur lesquels porte la présente police sont également garantis par d'autres contrats, souscrits avant ou après l'entrée en vigueur de la dite police, l'assuré est tenu de le déclarer à la Compagnie, par écrit, et de le faire mentionner soit dans la police même, soit par un endos inscrit par la Compagnie sur la dite police. Faute des susdites déclaration et constatation, avant tout sinistre, l'assuré n'aura droit à aucune indemnité visant la présente police."

Condition VIII. provided that, *inter alia*, "un transfert à autrui autrement que par testament ou du fait de la loi de l'intérêt que l'assuré peut avoir dans les objets garantis" should avoid the policy unless accepted and indorsed by the company before loss.

In March, 1911, during the currency of both these policies, a fire occurred which destroyed the whole of the insured property.

The respondent, a French subject, having executed a submission to the jurisdiction of His Majesty's Court, on April 18, 1911, issued a writ against the appellants claiming a loss under the two policies. The appellants by their defence raised two contentions. Firstly they alleged a non-compliance with Condition III. in that the assured in November and December, 1910, had effected other insurances on the property which had not been declared to the appellants or indorsed upon the policies issued by them. Secondly they alleged a non-compliance with Condition VIII. in that the respondent had transferred his rights to a lessee of the skating rink without acceptance or indorsement by them.

The facts as to the first contention were as follows: At the time when the policy of October 7, 1909, upon the building was issued the respondent had two concurrent policies thereon for 300*l.* with the General (United Counties) Company, called afterwards the United Counties Insurance Company, and for 300*l.* with the Law Guarantee Company. These facts were communicated

to the appellants and a record of them was inserted in the first policy sued on. Similarly at the time when the policy on the contents was issued the respondent had a concurrent policy thereon with the British Crown Company for 600*l.* This fact was communicated to the appellants and was recorded in the second policy sued on. At the end of 1910 the two policies on the building for 300*l.* with the United Counties Insurance Company and for 300*l.* with the Law Guarantee Company were replaced by two policies issued by the Property Insurance Company, the first for 350*l.* dated November 2, 1910, and the second for 350*l.* (of which 300*l.* only was on the building) dated December 15, 1910. The increase in these insurances from 600*l.* to 650*l.* on the building was to cover some extra decoration. Similarly the policy on the contents with the British Crown Company for 600*l.* was replaced by a policy issued by the Property Insurance Company dated November 9, 1910, for 600*l.* The Property Company's policy dated December 15, 1910, for 350*l.* also covered 50*l.* on some extra articles of furniture put into the building.

The appellants' second contention was based on the fact that on March 28, 1910, the respondent entered into a *contrat de location* by which he let the skating rink and its contents for one year to a person who was in possession thereunder at the date of the fire.

The learned judge by his judgment delivered on September 7, 1911, decided in favour of the respondent, holding that the conditions of the policy had been complied with.

E. F. Spence and Collinson, for the appellants. The obligation imposed upon the assured by Condition III. was not merely to declare the fact that there were other insurances upon the property. When the insurances were effected in November and December, 1910, the respondent was bound to declare them and to have them indorsed upon the policies. If "*le déclarer*" means only that the fact that there is a further insurance is to be declared the obligation would be satisfied by the declaration originally made, with the result that the assured would be left free to effect any number of additional insurances without the knowledge of the company. This would nullify the effect of the

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condition. The lease was a "transfert de l'intérêt" within Condition VIII. and, not being accepted or indorsed, avoided the policy.

Mackinnon, for the respondent, was not called upon.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of His Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte in an action in which Charles Nivert, the respondent, was plaintiff, brought to recover from the appellant company the sum of 1200*l.* under two policies of fire insurance effected with them in respect of the loss alleged to have been sustained by him through the destruction by fire of the insured property, namely, a skating rink named "Femina," situated at Smyrna, and the furniture and fittings contained in it.

On March 28, 1910, the respondent had leased this skating rink and the furniture contained in it to one M. Paul Verdreaux for a period of one year from April 1 then next following. The lessee went into possession. It is not disputed that while he was in possession, namely, on March 10, 1911, the rink and its contents were burned. Nor is it disputed that the policies of insurance sued on (which are in French) dated October 7 and 15, 1909, respectively, were validly entered into and were at the date when the fire occurred current.

The defences of the company are based upon two of the conditions printed on the back of each of these policies.

The first defence, which was scarcely seriously relied upon in the argument before their Lordships, was that this lease of March 28, 1910, was, within the meaning of the eighth condition, such a "transfert à autrui autrement que par testament ou du fait de la loi de l'intérêt que l'assuré peut avoir dans les objets garantis" as under the terms of that condition rendered the policies void. In their Lordships' opinion this lease for one year did not amount to a transfer to the lessee of the plaintiff's interest in the property insured within the meaning of this condition, inasmuch as the ownership of all that property subject to the lease remained in him, and was not transferred to any one.

The second condition on which the company relied ran as follows: "III. Si tout ou partie des objets sur lesquels porte la présente police sont également garantis par d'autres contrats souscrits avant ou après l'entrée en vigueur de la dite police, l'assuré est tenu de le déclarer à la Compagnie, par écrit, et de le faire mentionner soit dans la police même, soit par un endos inscrit par la Compagnie sur la dite police. Faute des susdites déclaration et constatation, avant tout sinistre, l'assuré n'aura droit à aucune indemnité visant la présente police."

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It is to be observed that the words "de le déclarer" and "de le faire mentionner" only mean that the fact that the property insured was further insured, "également garantis par d'autres contrats," should be declared to the company or mentioned in the manner provided. It is not required that any of the details of the policy should be given, not even its date, the name of the insurers or the assured, or the amount covered by it. The further insurance of the property already insured by the appellants would be a benefit to them in this respect, that in the event of a loss being sustained by the assured the several insurers would share the liability between them; and the only danger to their interests which could arise from the excessive insurance of the property would be that the assured might through negligence or by design bring about the destruction of or some injury to his own over-insured property. Thus the fact of the existence of insurances additional to their own is the matter which really concerns the insurers. It can make no real difference to them whether the additional assurances of which they were informed are kept up with the original insurers or are transferred to some other insurers, nor even whether they were allowed to drop if new policies for the same amount were effected to replace them. The danger of the destruction or injury by fire of the property insured would remain the same, the advantage of the distribution of the loss the same, in each of the three cases. The words "avant ou après" are introduced to secure that the really important fact, the existence of an insurance additional to those of the appellants, should be communicated to them.

These considerations are to be borne in mind when the meaning and object of a condition such as this third have to be

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determined. Now the facts which are relied upon to bring the respondent's claim within the reach of the condition are these : At or before the date of the policies sued on the respondent effected two concurrent policies on this rink for 300*l.* each, one with the General (United Counties) Company and one with the Law Guarantee Company. Notice of these policies was duly given to the appellants, and a memorandum was inserted in the respondent's policy of October 7 to the effect that the policies had been effected with these companies, and it was also indorsed that in lieu of the General (United Counties) Company the United Counties Insurance Company had taken over the risk on the former of them. The respondent had also effected a policy concurrent with the appellants' on the contents of this rink for 600*l.* with the British Crown Insurance Company, and a memorandum was accordingly entered in the respondent's policy of October 15 to the effect that this property was so insured to that amount. It is admitted that the requirements of the third condition were up to this time fully, indeed more than fully, complied with. The controversy arises out of what followed.

On November 2, 1910, a fire policy was effected by the respondent on the building with the Property Insurance Company, Limited, for the sum of 350*l.* ; and on December 15, 1910, a further policy for 350*l.* (of which 300*l.* was upon the building) was effected with the same company. On November 9, 1910, the respondent effected with the same company a third policy for 600*l.* upon the contents. No point is taken upon the increase by 50*l.* in the amount of these policies. No formal declaration was made to the appellant company that any of these policies had been effected, nor was any indorsement made on the policies sued on in reference to any of them.

The main question for decision is, therefore, whether this omission deprives the respondent, under Condition III., of all right to recover on the policies sued upon. It was contended on behalf of the respondent that the policies effected with the Property Insurance Company for 650*l.* on the building merely replaced those previously effected with the United Counties Company and the Law Guarantee Company respectively for

300*l.* each, and that the policies effected with the Property Insurance Company for 650*l.* on the contents replaced the policy previously effected with the British Crown Insurance Company for 600*l.*, the extra 50*l.* being intended in each case to cover some new decoration of the building and some additional furniture put into it. The dates at which the several policies were effected with the Property Insurance Company would of themselves suggest that some such replacement or substitution was designed to be effected. If it, in fact, took place, then, as the increases by the sum of 50*l.* are to be disregarded, the amount covered by the policies of insurance remained the same, nothing was altered but the identity of the insurers, which is one of the very things Condition III. did not require to be disclosed.

[After discussing the evidence their Lordships' judgment continued:] It is clear from the course of the trial and the judgment of the learned judge that it was not suggested that the policies, memoranda of which were indorsed on the policies sued on, were still in existence. They must, therefore, have either been surrendered or allowed to lapse, or the risk they covered must have been taken over by the Property Insurance Company through the machinery of the new policies, which last is what would appear to have been intended to be described by the word "transferred" used in the evidence. It is not suggested that they were allowed to lapse or were surrendered. And if the third course was that which was, in fact, taken, then that particular condition of things of which the third condition required the respondent to be informed, namely, the fact that premises were insured by others, remained practically unaltered, save to this extent, that the identity of the insurers was not the same.

Conditions such as this third condition are always in Courts of law construed strictly against insurance companies, and should always be interpreted in a reasonable sense, having regard to the business nature of insurance transactions. Their Lordships so construing and interpreting the condition are of opinion that its requirements have been complied with, and that it affords no defence to the plaintiff's claim,

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The appeal, they think, must therefore be dismissed, and they will humbly advise His Majesty accordingly.
The appellants must pay the costs of the appeal.
Solicitor for appellants: *Alex. J. Carruthers.*
Solicitors for respondent: *William A. Crump & Son.*

[PRIVY COUNCIL.]

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IN THE MATTER OF SIR STUART SAMUEL.

MATTER SPECIALLY REFERRED TO THE JUDICIAL COMMITTEE.
Parliament—Disqualification—Contract with the Secretary of State for India in Council—Contract for the Public Service—22 Geo. 3, c. 45—41 Geo. 3, c. 52—21 & 22 Vict. c. 106.

A member of a firm holding a contract with the Secretary of State for India in Council is, under 22 Geo. 3, c. 45, and 41 Geo. 3, c. 52, disabled from sitting and voting in the House of Commons.

MATTER referred to the Judicial Committee for consideration and report by an Order in Council under 3 & 4 Will. 4, c. 41, s. 4, dated February 11, 1913.

By an Order of the House of Commons made on November 22, 1912, a Select Committee was appointed to consider whether Sir Stuart Samuel had vacated his seat as a member of that House, in consequence of the firm of Samuel Montagu & Co., in which firm he was a partner, having entered into transactions with the Secretary of State for India in Council.

On December 19, 1912, the Select Committee presented to the House a special report stating that important and difficult questions of law were involved, and asking the House to determine whether, while reserving its right of ultimate decision, the House should invoke the power of the Crown under 3 & 4 Will. 4, c. 41, s. 4, to refer the questions of law for consideration by the Judicial Committee of the Privy Council.

* *Present*: VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, and LORD DUNEDIN.

The Select Committee agreed to a further special report, by which they stated as follows:—

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1. Sir Stuart Samuel was elected a member of the House of Commons on December 7, 1910, for the constituency of Tower Hamlets (Whitechapel).

2. At all material times he was a partner in the firm of Samuel Montagu & Co. (hereinafter called the said firm), foreign bankers, bullion brokers, and merchants of London.

3. The said firm entered into the following transactions with the Secretary of State for India in Council:—

(a) Short loans from the Secretary of State for India in Council to the said firm. These were based upon tenders addressed by the said firm to the Secretary of State for India in Council. The transactions, a list of which appeared in the appendix to the report, were numerous and were made at various dates between November 11, 1910, and November 30, 1912, between which dates they were continuous.

(b) India Council Bills. The said firm (upon announcement inviting tenders for such bills at the Bank of England on behalf of the Secretary of State for India in Council) tenders to purchase in London such bills drawn in London on India. The said firm pays in sterling in London, and the bills are payable in rupees in India. From the appendix to the report it appeared that the said tenders were addressed to the Secretary of State for India in Council and that the transactions under this head during the material period were numerous and took place at various dates between October 5, 1910, and October 25, 1912.

(c) India Treasury Bills. From time to time notices appear in the *London Gazette* asking for tenders for these bills, and the said firm was in the habit of sending in tenders to purchase such bills, and its tenders were accepted on April 8, June 16, and December 1, 1911.

(d) India Government Loans, announced by a prospectus to the public inviting subscriptions to be applied for through brokers and allotted to successful applicants by and on behalf of the Secretary of State for India in Council. The said firm subscribed toward such loans during the relevant time, but no list of the extent of its transactions under this head was put in evidence.

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(e) The Secretary of State for India in Council employed the said firm to purchase silver for the purpose of the Indian currency. A list of these transactions and correspondence relating thereto were given in the appendix to the report. Under letters of instructions written on behalf of the Secretary of State for India in Council the said firm at various dates between March 5, 1912, and September 24, 1912, made numerous purchases of silver amounting in the aggregate to 5,205,000*l.* approximately.

The nature of the silver purchase transactions (e) further appeared from the following correspondence. By a letter dated January 8, 1912, from the said firm to the chairman of the Finance Committee of the Council for India, they wrote as follows: "Our proposal is this. We receive consignments, from special clients of our own, of silver peculiarly adapted to coinage purposes, averaging about 50,000*l.* per week which we sell at the market prices. We suggest that we put this silver down to your account at the market prices ruling on the days we make the sale and deposit it at the Bank of England for your account. We should not disturb the market, because we should make no purchases for the Council 'at fixing' and, what is more important, no one would have the remotest idea that you were buying and prices would not be run up against you."

By a letter dated March 4, 1912, the firm were informed that the Secretary of State for India in Council desired them to purchase on his behalf bar silver up to the value of 500,000*l.* and that he left it to the firm's discretion to purchase at such times and in such amounts as they might consider expedient with the object of avoiding, as far as possible, any action likely to raise the price of the metal. At later dates further instructions for purchases were given, and upon each purchase being made a contract was forwarded by the firm to the Financial Secretary.

By a letter dated March 8, 1912, from the firm to the Financial Secretary they wrote: "we take this opportunity to confirm the arrangement we made last week that all purchases we make for you are subject to a brokerage of $\frac{1}{8}$ per cent."

On November 13, 1912, the firm, in answer to a request for the names of their clients from whom they purchased silver, wrote

that it was impossible for them to give them, adding : “ . . . it is the invariable rule and has ever been so that the four recognised bullion houses who, as you are aware, compose the London market assume the entire responsibility towards both their buying and selling clients who, from the very nature of their business, demand and expect entire secrecy as to their operations. Although your orders have been large they formed at times but a portion of our business and it is no more practicable to disentangle from the list those who provide your silver than to identify the grape from which any given drop of wine has been obtained.”

In pursuance of an humble address presented by the House of Commons dated January 31, 1913, His Majesty on February 11, 1913, was pleased, by and with the advice of his Privy Council, to order “ that the following question of law be and the same is hereby referred to the Judicial Committee for their hearing and consideration, viz. :—Whether, by reason of the facts which have been reported by the above named Select Committee of the House of Commons the said Sir Stuart Samuel is disabled from sitting and voting in the House.”

Sir Robert Finlay, K.C., and Atkin, K.C. (Neilson with them), for the Crown. Each of the transactions referred to in the special report was a contract with the Secretary of State for India in Council. It is, however, sufficient to consider the question with regard to the silver purchases (*c*) and the short loans (*a*). The position of the firm as to the silver purchases was that described by Blackburn J. in *Ireland v. Livingstone*. (1) The firm were brokers, but they also undertook the responsibility of principals; there was no privity between the Secretary of State and the firm's customers. The sole question is whether the general words of 22 Geo. 3, c. 45, s. 1 (2), must be so limited

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(1) (1872) L. R. 5 H. L. 395, at p. 408.

(2) 22 Geo. 3, c. 45, s. 1, “ for further securing the freedom and independence of Parliament,” enacts that “ any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him,

or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, or commission, made or entered into with, under, or from the Commissioners of His Majesty's Treasury, or of the Navy, or Victualling Office, or with the

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as to exclude a contract with the Secretary of State for India in Council. In construing a statute one of the elements for consideration is the mischief which the statute was intended to meet: *Heydon's Case*.⁽¹⁾ The object of the statute under discussion is stated in its first words to be for 'securing the freedom and independence of Parliament.' The words "for the public service" in s. 1 of the Act are used in their natural meaning and not as a term of art; they are varied in the section by using the equivalent phrase "for the service of the public." The general words in the section should not be cut down by putting a limited and artificial meaning on the words "public service," but by a consideration of the class of persons who are specifically referred to, and by applying the *ejusdem generis* rule. Upon these considerations the Act, in conjunction with 41 Geo. 3, c. 52, applies to all contracts made with any department of Government in its public capacity, whether dealing with home affairs or with the affairs of a colony or dependency, provided that the department is a part of the central or Imperial Government, whether located in the United Kingdom or not. It would apply, for instance, to a contract by the Colonial Secretary with regard to Jamaica, but not to a contract made with one of the Agents-General for the Colonies. In *Thompson v. Pearce* ⁽²⁾ a clothier was held not to be disqualified by reason of a contract with the colonel of a regiment, but the contract in that case was made by the colonel, who was supplied with money to clothe the regiment and was bound by no contract to supply clothing. There was in that case no contract on behalf of the Government.

Master General or Board of Ordnance, or with any one or more of such Commissioners, or with any other person or persons whatsoever, for or on account of the public service; . . . shall be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from

the same."

41 Geo. 3, c. 52, s. 1, provides that "all persons disabled from or incapable of being elected, or sitting and voting in the House of Commons of any Parliament of Great Britain, shall be disabled from and be incapable of being elected or sitting and voting in the House of Commons of any Parliament of the United Kingdom."

(1) (1584) 3 Rep. 7b.

(2) (1819) 1 Brod. & B. 25.

A consideration of the Government of India Act, 1858 (21 & 22 Vict. c. 106), shews that the Secretary of State for India in Council is a person ejusdem generis with the officials referred to in 22 Geo. 3, c. 45, s. 1. The manner in which the Secretary of State exercises, by the authority of Parliament, power in India transferred to the Sovereign by s. 2, whether he does so alone (under ss. 3, 25, and 26) or with the concurrence of the Council (under ss. 40 and 41), is not material. In either case he is acting on behalf of the Crown. Nor does it affect the matter that (under s. 68) contracts made by the Secretary of State in Council bind only the revenues of India. A contract which is to be met out of the revenues of India is just as much within the mischief aimed at as one which falls upon the revenues of the United Kingdom. If the Board of Control (which was established in 1784) had had power to make contracts, and those contracts had to be met out of the contributions made by the East India Company to the revenue of Great Britain (as to which see 21 Geo. 3, c. 65), it cannot be doubted that those contracts would have been within 22 Geo. 3, c. 45. The position with regard to contracts which, under the Government of India Act, have to be met out of the revenues of India is the same. Further, if contracts of the kind now in question are not within the Act, neither would have been contracts payable out of the hereditary revenues of the Crown, which at the passing of the Act were considerable (see Anson's Law of the Constitution, 3rd ed., 1908, vol. ii., p. 135), and this would to a great extent have nullified the beneficial effect of the statute. The question in the present case arose and was argued in *Royce v. Birley*. (1) It was, however, held in that case that the Act did not apply as the contract in question had been executed except as to payment before the election. No decision on the general point was given, but Brett J. in the course of his judgment (2) inclined to the view that the contract if not executed would have been within the statute. In the *Cambridge Case* (3) a committee of the House of Commons held that Mr. Forsyth's election was void on the ground that he was standing counsel to the Secretary of

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(1) (1869) L. R. 4 C. P. 269.

(2) *Ibid.* at p. 320.

(3) (1866) 29 & 30 Vict. c. 20.

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State for India in Council. The facts of that case appear from the Act passed to indemnify the respondent. In *Rothschild's Case* (1), which related to an arrangement for a loan, a committee of the House held that there was no disqualification, but the decision proceeded on the ground that there was really no contract.

The statute 41 Geo. 3, c. 52, was passed upon the union with Ireland in 1801; its object was to bring the disqualifications existing as to the Irish Parliament, under the Irish Acts 33 Geo. 3, c. 41, and 38 Geo. 3, c. 36, which did not deal with contracts, into line with the disqualifications for office holders and contractors applicable to Great Britain under 6 Anne c. 41, s. 24 (in Ruffhead c. 7, s. 25), 15 Geo. 2, c. 22, and 22 Geo. 3, c. 45, and to make one statute applicable to the joint Parliament. It cannot be argued from the passing of that statute, or from the form in which it was passed, that 22 Geo. 3, c. 45, had no application outside Great Britain. It was passed to remove any doubts which might exist. The words "in Ireland" in 41 Geo. 3, c. 52, s. 4, inserted after "public service" really refer to the locality of the officials named, there being, for instance, separate Commissioners of the Treasury in Ireland till 1816. Moreover, although the application of 22 Geo. 3, c. 45, was not confined to Great Britain it did not apply to Ireland, because the officials in Ireland were not ejusdem generis with the officials for Great Britain who were named; under 22 Geo. 3, c. 53, which statute came into operation concurrently with 22 Geo. 3, c. 45, Ireland was a separate kingdom. Inasmuch as under the Act of Union (39 & 40 Geo. 3, c. 67) 100 members of the Irish Parliament took their seats in the joint Parliament without a fresh election, it was desirable to specify the disqualifications with particularity.

Danckwerts, K.C., and *Buckmaster, K.C.* (*Spens* with them), for Sir Stuart Samuel. The operative statute with regard to the disqualification of members who are contract holders is now 41 Geo. 3, c. 52, but in so far as 22 Geo. 3, c. 45, s. 1, is incorporated therein it is necessary to determine its proper construction. The words "for and on account of the public service" in that section refer to the public service of Great

Britain only and include only contracts made with the Crown of Great Britain through administrative officials acting for the Crown and dealing, in that capacity, with the revenues of Great Britain. This is borne out by the consideration of the statutes disqualifying persons holding offices under the Crown, namely, 12 & 13 Will. 3, c. 2, s. 3; 4 & 5 Anne c. 20, s. 29; 6 Anne c. 41; 15 Geo. 2, c. 22; whenever it was intended to include in the operation of these Acts office holders outside England or, after the union with Scotland, Great Britain they are specifically mentioned; see particularly the last-named enactment. The statute 22 Geo. 3, c. 45, being an Act of the Parliament of Great Britain must be construed, *prima facie*, as applying only to the internal affairs of Great Britain: Dwarris on Statutes (1848), pp. 903, 904. The intention of 41 Geo. 3, c. 52, was to apply 22 Geo. 3, c. 45, to the altered circumstances arising from the union with Ireland. The Crown, in relation to office holders, became the Crown of the United Kingdom, and similarly the "public service" became the public service of the United Kingdom. The framework of the Act preserves the distinctive disqualifications for British and for Irish constituencies side by side, while s. 4 refers to "public service in Ireland" and refers to the Commissioners of the Treasury in Ireland. The inference is that the earlier Act meant to refer only to the public service of Great Britain payable out of the revenue of Great Britain, and the later to the public service of the United Kingdom payable out of the revenue of the United Kingdom. The Public Accounts Acts, of which 20 Geo. 3, c. 54, is an example, shew that "public service" in Acts of Parliament commonly means public service defrayed out of the revenue of Great Britain. The officials specifically referred to in 22 Geo. 3, c. 45, s. 1, were all persons who in their official capacity could make contracts solely on behalf of the Crown enforceable by petition of right only: *Macbeath v. Haldimand* (1); *Reg. v. Lords of the Treasury* (2); *Armytage v. Wilkinson* (3); *Palmer v. Hutchinson*. (4) A reference to the actual contracts made by those officials shews that they were in form made "for and on behalf of His Majesty." Applying the *ejusdem generis* rule as laid down by Erle C.J. in *Reed*

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(1) (1786) 1 T. R. 172.

(3) (1878) 3 App. Cas. 355.

(2) (1872) L. R. 7 Q. B. 387.

(4) (1881) 6 App. Cas. 619.

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v. *Ingham* (1), it is only persons possessing this characteristic who can be held to be within the scope of the general words.

The Secretary of State for India in Council derives his authority and status from 21 & 22 Vict. c. 106, and properly to appreciate his position reference should be made to 3 & 4 Will. 4, c. 85, which dealt with the East India Company. By s. 3 of the 1858 Act the Secretary of State for India in Council is put in the position of the East India Company and of the Board of Control. He cannot be treated as part of the administration of the United Kingdom. His office has not the characteristics found to exist among the officials specified in 22 Geo. 3, c. 45, s. 1. By s. 40 he can only contract with the concurrence of a majority of the Council, the members of which under s. 11 can only be removed by an address of both Houses, and by s. 68 the liability for the contracts he makes is only to be satisfied out of the revenue of India; by s. 65 he may sue or be sued as a corporate body. He has no power to bind the Crown by contracts, and a petition of right cannot be brought to enforce a contract made by him: *Frith v. The Queen* (2); *Kinloch v. Secretary of State for India*. (3) He is consequently not a person ejusdem generis with those mentioned in 22 Geo. 3, c. 45. He is, moreover, invested with administrative and legislative powers which place him in the position of an independent legislature: *Reg. v. Burah*. (4) Further it is a rule of construction, supplementary to the ejusdem generis rule, that where a number of persons are specifically mentioned in a descending order of importance or authority a person of higher importance and authority cannot be brought in under general words: 2 Co. Inst. 457; *Archbishop of Canterbury's Case* (5); *Cope v. Barber*. (6) The decision in *Thompson v. Pearce* (7) supports the view that there was no contract within the statute. In any case the transactions (a), (b), (c), and (d) are not contracts for the public service within the meaning of the statute: *Rothschild's Case* (8); *The Londonderry*

(1) (1854) 3 E. & B. 889, at p. 901.

(5) (1596) 2 Rep. 46a.

(2) (1872) L. R. 7 Ex. 365.

(6) (1872) L. R. 7 C. P. 393, at

(3) (1880) 15 Ch. D. 1; (1882) 7

p. 403.

App. Cas. 619.

(7) 1 Brod. & B. 25.

(4) (1871) 3 App. Cas. 889.

(8) 100 Jour. 325, 328.

Case. (1) The statute 22 Geo. 3, c. 45, disqualifies individuals and constituencies; it must therefore be construed strictly and should not be expanded owing to the supposed purpose of the Act.

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Sir R. Finlay in reply. Under s. 39 of 21 & 22 Vict. c. 106 the whole of the property of the East India Company vested in the Crown. The provision in s. 65 that the Secretary of State in Council may sue or be sued is merely to provide the mode in which the contract shall be enforced. This appears from the judgments of James L.J. and of Lord Selborne (in the House of Lords) in *Kinloch v. Secretary of State for India*. (2) The contract is none the less a contract on behalf of the Crown; it cannot be enforced by execution against the Crown, but neither could it be if the mode of procedure were by petition of right. The Secretary of State for India in Council is merely one of the five Secretaries of State (s. 3), and relatively to the Crown he is in the same position as the other Secretaries of State: *Sir Henry Jenkyns' British Rule and Jurisdiction beyond the Seas* (1902), pp. 13 and 14. It is immaterial that he contracts only with the concurrence of the Council, the members of which are servants of the Crown though in a position of some independence; how entirely subordinate he is to Parliament appears from 3 & 4 Will. 4, c. 85, s. 51. There are many other departments of Government which are given a corporate power to contract and, in most cases, power to sue or be sued, e.g., Commissioners for Works, by 37 & 38 Vict. c. 84, s. 2; Prison Commissioners, by 40 & 41 Vict. c. 21; Ordnance Board (which is one of the Boards mentioned in 22 Geo. 3, c. 45), by 5 & 6 Vict. c. 94, s. 34, and 18 & 19 Vict. c. 117, s. 3; Postmaster-General, by 31 & 32 Vict. c. 110, ss. 4 and 6; Board of Agriculture, by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30). The words "public service" cannot be treated as applying only to Great Britain. The British Government in 1782 was the only Imperial Government; the Government of Ireland from 1782 to 1800 was a local government, it had no power outside Ireland. Self-governing colonies were not then in existence; they had Legislatures for their own domestic purposes, but as regards commercial relations and external affairs control

(1) (1860) Wolf. & B. 206. (2) 15 Ch. D. at p. 8; 7 App. Cas. at p. 622.

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rested with the Government of Great Britain. Public service means public service of the whole Empire, whether in Great Britain or beyond the seas.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. His Majesty was pleased, in accordance with an humble address of the House of Commons, dated January 31, 1913, to communicate to the Judicial Committee a report of the Select Committee of the House of Commons, and to refer to the Judicial Committee the following question of law for their hearing and consideration, namely, "Whether by reason of the facts which have been reported by the above-named Select Committee of the House of Commons the said Sir Stuart Samuel is disabled from sitting and voting in the House."

The facts which raise the question are that Sir Stuart Samuel, being a member of the House of Commons for the Tower Hamlets, was partner in a firm which made contracts with the Secretary of State for India in Council for borrowing money upon short loans, for purchasing India Council bills and India Treasury bills, for subscribing to India Government loans, and for purchasing silver for the purposes of the Indian currency.

If any one of these contracts answers the description given in s. 1 of 22 Geo. 3, c. 45 (1782), as to the person with whom and the service for which it was made, then the seat was forfeited.

This Act of Parliament itself declares that it was made to preserve the freedom and independence of Parliament; and the mischief guarded against is the sapping of that freedom and independence by members being admitted to profitable contracts. But the enacting words do not apply to all contracts. Their application is limited in two ways. In the first place, the member of Parliament must have "directly or indirectly" undertaken the contract with "the Commissioners of His Majesty's Treasury, or of the Navy or Victualling Office," or "the Master General or Board of Ordnance" or "any one or more of such Commissioners" or "any other person or persons whatsoever."

In the second place, it must appear that the contract was made "for or on account of the public service." And it was argued

* THE LORD PRESIDENT (VISCOUNT MORLEY OF BLACKBURN) presided.

that in this particular case both these limitations had the effect of taking Sir Stuart Samuel's case out of the statute.

The meaning of the first limitation was much discussed in argument at the Bar, and must be determined by the familiar canons of construction. All the persons enumerated in the first section of this Act were servants of the Crown in 1782 (the date of the Act) holding offices in the British as contrasted with the Irish Government or any other Government of the King's dominions or dependencies beyond the seas. They were officers of the British Government, which was also the Imperial Government of the King. When therefore the first section of the Act of 1782, after enumerating these several office holders, proceeds to add the words "any other person or persons whatsoever," the doctrine of *ejusdem generis* applies. Any "other person" meant any one who held an office in the British Government of a similar kind to those enumerated.

The second limitation—that the contract must be one made "for or on account of the public service"—was much relied upon by counsel for Sir Stuart Samuel. They urged that these words meant "the public service of Great Britain" (now incorporated in the United Kingdom), and that no service could be so denominated unless it was paid for out of moneys voted by Parliament, or at all events out of British money. It does not seem to their Lordships that the public service required by the Act need be one either executed or requited within Great Britain or paid for out of any particular fund. No such language is to be found in the Act, and such an interpretation would leave applicable to the purposes of bribery all the hereditary revenues of the Crown, now for the most part received by the Exchequer under temporary Civil List Acts, together with all revenues from sources inside or outside this country which ministers might have the power to dispose of without a vote of Parliament, such as funds derived from some dependency beyond the seas. No reason can be given for thus cutting down the scope of this Act. The source from which contracts are to be paid for is immaterial. So is the place where they are made.

It is desirable to notice an argument derived from s. 4 of 41 Geo. 3, c. 52, passed in 1801. This section disqualifies for a seat

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in the Parliament of the United Kingdom any one who makes a contract with a Commissioner of His Majesty's Treasury in Ireland or with any other person whomsoever for or on account of the public service in Ireland. This was surplusage (such is the argument) if the Act of 1782 had already made such contracts, irrespective of place, a ground of disqualification for the British Parliament, since all persons disqualified for the British Parliament were by s. 1 of the Act of 1801 already disabled from sitting in the Parliament of the United Kingdom, at all events for British constituencies. There are several answers to this contention. It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, *ex abundante cautela*, to remove possible doubts. Further, their Lordships do not consider that s. 4 of the Act of 1801 was in fact surplusage. Contracts made with a Commissioner of the Irish Treasury or with any one in a like position for any purpose were not within the Act of 1782, because these Irish officials were not officials of the British Government. Such a contractor was therefore not disqualified by s. 1 of the Act of 1801 for a British constituency in the Parliament of the United Kingdom. He was also not disqualified for an Irish constituency, because in the legislation affecting the Irish Parliament, though certain placemen were disqualified, contractors were not. As then the Irish Treasury continued to have a separate existence after 1801, it was thought right to create a fresh disqualification in regard to contracts made with them or with other persons in a like position to them. So s. 4 was not surplusage. It enlarged the area of disqualification, and its presence on the Statute Book is in no way inconsistent with the construction which their Lordships put upon the Act of 1782.

Accordingly the case of Sir Stuart Samuel falls within this Act if the Secretary of State for India in Council is a person answering to the statutory description, and the contracts which he has made were "for or on account of the public service," that is to say, any service of the Crown anywhere.

It is obvious that these contracts were made for the public service of the Crown in India, and the point remaining for

consideration is whether the Secretary of State for India in Council falls within the description to be found in the first section of 22 Geo. 3, c. 45. This was strenuously contested.

By the Act of 1858 the government of India, which had theretofore been carried on by the East India Company on behalf of the Crown, under divers Acts of Parliament, was transferred to the direct control of the Crown, acting through officers whose duties were prescribed by the Act. One of these officers is a Secretary of State. In early times there was one English Secretary of State. Then there were two British Secretaries of State, and before 1858 the number was increased to four. The Act of 1858 created a fifth, who is paid out of the revenues of India. To him are in practice allotted the duties of transacting that part of the business relating to India which requires the intervention of a Secretary of State, and he is commonly called the Secretary of State for India. But he is in fact one of His Majesty's five principal Secretaries of State, and as such can discharge most, if not all, of the duties of the other four, as they can discharge most, if not all, of his duties. He is an officer of the British Government in the fullest sense.

A Secretary of State would certainly have come within the description of the Act of 1782, and members of the British Parliament in 1782 would have been disabled from sitting in the Parliament of Great Britain by reason of contracting with him within that Act. This disability was continued so as to affect members of the Parliament of the United Kingdom by 41 Geo. 3, c. 52, which enacts that "all persons disabled from, or incapable of, being elected, or sitting and voting in the House of Commons of any Parliament of Great Britain, shall be disabled from, and be incapable of, being elected or sitting and voting in the House of Commons of any Parliament of the United Kingdom, as knights, citizens, or burgesses for any county, stewartry, city, borough, cinque port, town, or place, in that part of the United Kingdom called Great Britain." It follows, therefore, that to contract with a Secretary of State after the union with Ireland has the same effect upon the seat of a British member of Parliament (which Sir Stuart Samuel is) as it would have had in 1782 before that union. Sir Stuart Samuel is disabled if the firm of which he

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was a member did in fact make the contracts in question with the Secretary of State.

Now the contracts were expressed to be made with the Secretary of State in Council, pursuant to the Act of 1858 for the better government of India, and were made with the concurrence of a majority of the Council, to be paid for out of the revenues of India as required by that Act, and without any personal liability on the Secretary of State. And by s. 65 of that Act, "the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate." It was urged that it was not with the Secretary of State at all that the firm contracted, but with a corporation. Their Lordships cannot take this view. A contract is none the less made with the Secretary of State that he has to obtain the concurrence of others before making it, and that he and they are designated by this statute as liable to be sued or to sue on it as a corporate body. He and they have distinct functions prescribed by the statute which enables them to bind their successors, and this provision affords facilities for litigation which are not afforded by a petition of right. But this is merely machinery; the personality of the Secretary of State is not merged in any corporation by the statute, nor is that of the Council. In some particulars they can check him or he can override them. They and he remain with separate and possibly conflicting responsibilities, though for purposes of litigation they can be treated as though they were one legal personality. These contracts were made with one of His Majesty's principal Secretaries of State and with his Council, or with the concurrence of a majority of his Council, it matters not which, for they were made at all events with him.

Under these circumstances, though no suggestion has been made of any improper motive, and though the construction placed upon the statutes by Sir Stuart Samuel finds some countenance in former proceedings before committees of the House of Commons, their Lordships are obliged to answer the question of law referred to them as follows. They will humbly advise His Majesty that by reason of the facts which have been reported by the above-named Select Committee of the House of

Commons the said Sir Stuart Samuel was disabled from sitting and voting in the House.

Solicitor for the Crown : *The Treasury Solicitor.*

Solicitors for Sir Stuart Samuel : *Freshfields.*

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[HOUSE OF LORDS.]

LEAROYD OR DICK APPELLANT; H. L. (Sc.)*

AND

ALSTON RESPONDENT. 1913
June 18.

Agent and Client—Negligence—Breach of Duty.

Interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland, 1911 S. C. 1248, affirmed on the evidence.

APPEAL from interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland. (1)

The appellant, a married lady, brought an action, with the consent and concurrence of her husband as her curator and administrator-in-law, against John Motherwell Alston, who was a solicitor and bank agent in Coatbridge, for payment of the sum of 10,000*l.* as damages.

The grounds of the action as stated in the record were, first, that Mr. Alston, as the appellant's law agent, gave her improper advice with regard to the investment of certain of her funds, and, secondly, that, in breach of his duty, he made a profit out of certain transactions with her.

The Lord Ordinary (Lord Salvesen) came to the conclusion upon the evidence that the appellant had failed to make out her case, and assoilzied Mr. Alston from the conclusions of the summons; and his interlocutor was adhered to by the First Division (the Lord President, Lord Mackenzie, and Lord Kinnear (Lord Johnston dissenting)).

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Mr. Alston had died since the presentation of the appeal to this House, and the present respondents were the executors and trustees of his trust settlement.

1913. June 16, 18. *Constable, K.C.*, and *A. M. MacRobert* (with them *John MacGregor*) (all of the Scottish Bar), for the appellant.

H. P. Macmillan, K.C., and *D. P. Fleming* (both of the Scottish Bar), for the respondents.

The HOUSE, without calling upon counsel for the respondents, affirmed the interlocutors appealed from.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 18, 1913.

Agents for appellant: *G. J. Strickland*, for *Hume McGregor & Co., S.S.C., Edinburgh.*

Agents for respondents: *John Kennedy, W.S.*, for *Laing & Motherwell, W.S., Edinburgh.*

[HOUSE OF LORDS.]

POTTS OR YOUNG (PAUPER).	APPELLANT;	H. L. (Sc.)*
AND		
NIDDRIE AND BENHAR COAL COMPANY,)		1913
LIMITED, PORTOBELLO	) RESPONDENTS.	July 1.

*Employer and Workman—Compensation—Dependants—Desertion by Father—
Decree for Aliment—Workmen's Compensation Act, 1906 (6 Edw. 7,
c. 58), s. 13.*

In March, 1907, a workman deserted his wife and children. Up to 1909 he occasionally made small payments to his wife and two younger children, amounting in all to 2*l.*, which was applied towards the support of the family. The payments then ceased, and in September, 1909, the wife obtained a decree against him for aliment of the two younger children, who were in pupillarity, and recovered 17*s.* from his employers by arrestment used on the decree. The workman then disappeared to avoid further diligence and was not traced until his death in April, 1911, by accident arising out of and in the course of his employment. The wages due to him on his death were paid to his wife. From the date of his desertion the wife and family were supported entirely, except as above stated, from the earnings of the two elder children. These contributions were not made ex pietate and could have been recovered from the father under the decree for aliment. The widow claimed compensation under the Workmen's Compensation Act, 1906, on behalf of her two pupil children:—

Held, that there was evidence upon which the arbitrator could find that these children were wholly dependent on the earnings of their father.

Interlocutor of the Second Division of the Court of Session in Scotland, 1912 S. C. 644, reversed.

New Monckton Collieries, Ltd. v. Keeling [1911] A. C. 648, distinguished.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an award made by the sheriff-substitute of the Lothians and Peebles at Edinburgh as arbitrator under the Workmen's Compensation Act. (1)

The appellant, the widow of Robert Young, deceased, claimed compensation as tutrix and administratrix in law for her pupil children Richard and Gretta Young in respect of the death of her

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H. L. (SC.) husband, their father, by an accident arising out of and in the course of his employment as a miner at the respondents' coal mine, Woolmet Pit, Bonnyrig, Mid Lothian.

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The sheriff-substitute found that the two pupil children were wholly dependent on the earnings of the deceased at the date of his death and made an award of 216*l.* 9*s.* in favour of the appellant as tutrix and administratrix aforesaid on that footing.

At the request of the respondents the sheriff-substitute stated a case for the opinion of the Court. The facts found by the case may be summarized thus :

In March, 1907, the father left his home at High Bonnybridge, Stirlingshire, and his wife and family and took a house for himself at Broomhill, a place in the immediate neighbourhood. The family consisted of two elder sons, then aged seventeen and fourteen years respectively, and the two younger children above mentioned, then aged seven and four years respectively. The two elder children were earning wages out of which they kept the family together, maintaining themselves and their mother and the two younger children. The mother occasionally earned two or three shillings by charing, but this was insufficient to keep herself. The two younger children earned nothing. For a time the father occasionally gave the mother and the younger children small sums when he met them on the road. These sums amounted altogether to about 2*l.* and were applied towards the maintenance of the family. The father was afterwards employed at Castlecary, about three miles from his former home, and nothing further was got from him for the children. The mother then raised an action on behalf of her two pupil children against the father for payment of aliment, and on September 6, 1909, obtained a decree against him for payment to her of 15*l.* 12*s.* per annum for each of the said children so long as they should remain in her custody. She extracted the decree immediately, used arrestment thereon in the hands of the father's then employers, and attached thereunder a sum of 17*s.* which was paid to her. To avoid further diligence the father left his employment at Castlecary and also left the district. Notwithstanding that the mother and the two elder sons, with the assistance of others, made all reasonable inquiries, they failed to trace

him until the eldest son, on April 22, 1911, received a post-card sent at the father's request by a doctor in the Royal Infirmary, Edinburgh, whither the father had been taken on meeting with the accident which caused his death. The father died before the son arrived at the infirmary, and his wife received payment of the wages then due to him, amounting to 2*l.* 18*s.* The two elder sons, who were under no obligation to maintain the younger children, were not maintaining them *ex pietate*, and the sum contributed by them would have been recoverable by them from their father under the decree. The father was liable under the decree to repay the disbursers of the aliment due thereunder, and his estate after his death was also liable to be made available in the same manner.

On these facts the sheriff-substitute found that the two younger children were wholly dependent upon the earnings of their father at the time of his death, and he also stated that in any event he would hold that they were partially dependent on the said earnings.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) found that the two younger children were neither wholly nor partially dependent on the earnings of their father and recalled the award of the sheriff-substitute.

1913. June 17. *J. Robertson Christie* and *J. B. Young* (both of the Scottish Bar) (with them *J. B. Melville*), for the appellant. The arbitrator has found as a fact that the two younger children were wholly dependent on the father's earnings within the meaning of the Workmen's Compensation Act, and there being evidence to support that finding, and it not having been arrived at under any erroneous view of the law, it was not competent to the Second Division of the Court of Session to disturb it. Dependency, no doubt, is a question of fact, and does not depend upon any legal presumption, but in deciding on the fact of dependency the legal obligation of the father to support his children is an element to be taken into account. The Lord Justice-Clerk was wrong in holding that dependency necessarily involved actual payment by the deceased up to the time of his

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H. L. (Sc.) death. The elder brothers were under no obligation to maintain the younger children, and the reasonable inference from the facts found by the arbitrator is that they maintained them in reliance upon the decree obtained against the father and in the reasonable expectation of recovering from him the sums which they had contributed. The only reason why that decree was not further enforced against the father was that he was keeping out of the way to avoid further diligence. *New Monkton Collieries, Ltd. v. Keeling* (1) is distinguishable from the present case because in that case there was no evidence to support the finding of the arbitrator. The appellant relies upon the law as laid down by Fletcher Moulton L.J. in *Lee v. Owner of Ship Bessie*. (2) [They also referred to *Hodgson v. Owners of West Stanley Colliery* (3); *Briggs v. Mitchell* (4); *Sneddon v. Addie & Sons' Collieries, Ltd.* (5); *William Baird & Co., Ltd. v. Birsztan* (6); *Turners, Ltd. v. Whitefield* (7); *Lindsay v. Stewart McGlashen & Son, Ltd.* (8); *Dobbie v. Egypt and Levant Steamship Co., Ltd.* (9)]

Munro, K.C. (of the Scottish Bar), and *Harold W. Beveridge*, for the respondents. To be a dependant within the definition in s. 13 of the Workmen's Compensation Act a person (1.) must be a member of the workman's family, (2.) must be dependent on the earnings of the workman, and (3.) must be so dependent at the time of the workman's death. It is conceded that that last phrase must not be construed narrowly, but the object of the statute is to compensate for actual loss measured by the circumstances of the present and a reasonable anticipation into the future. Applying that principle to the facts of the present case, for more than eighteen months the mother did not receive one penny of the workman's wages, and during that time the pupil children were in fact maintained by their two elder brothers. The finding as to the money being recoverable from the father or his estate is law, not fact, and is wrong. There is no finding of fact which suggests any reasonable probability of the decree

(1) [1911] A. C. 648.

(2) [1912] 1 K. B. 83, at p. 87.

(3) [1910] A. C. 229.

(4) 1911 S. C. 705.

(5) (1904) 6 F. 992.

(6) (1906) 8 F. 438.

(7) (1904) 6 F. 822.

(8) 1908 S. C. 762.

(9) 1913 S. C. 364.

being effectively enforced. The decree is merely a judicial expression of the father's liability and does not prove that at the date of his death the children were in fact dependent on him. There is no finding that reliance was placed on the decree by either the mother or the children, and there was no evidence that the decree was of any value at all. Suppose the mother had been asked what she was living on she would have said she was living on her sons. Suppose the sons had been killed by an accident in their employment, would the employers have had any answer to a claim for compensation by the mother on the footing that she was wholly dependent on her sons? *New Monckton Collieries, Ltd. v. Keeling* (1) governs this case. As Lord Atkinson there says, it is by the discharge of the obligation to maintain, not by its mere existence in law, that a husband maintains his wife and family. The award of the sheriff-substitute is really basing dependence upon the legal liability of the husband to maintain. No case can be found where compensation has been awarded under circumstances at all resembling the facts of this case.

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The House took time for consideration.

July 1. VISCOUNT HALDANE L.C. My Lords, in the judgment which I am about to read Lord de Villiers, who is unable to be present, asks me to express his concurrence.

In substance the facts as found by the sheriff-substitute are that the two pupil children have been since 1907, when their father left the home, maintained by the mother out of the earnings of the two elder children, together with some small sums which the father gave to the younger children when he met them on the road. The mother's own earnings were so small that they were insufficient for her own maintenance. The contributions from the earnings of the two elder children were not gifts made ex pietate, but were sums advanced to meet the necessities of the situation, which they or their mother might have recovered from the father. In 1909 the father had failed to pay the aliment he had promised, and the mother raised an action in the

H. L. (SC.) Sheriff Court and obtained a decree against him for 15*l.* 12*s.* per annum for each of the two pupil children. The decree was enforced in September, 1909, by arrestment of a small sum due to the father from his then employers. After that he disappeared in order to avoid further diligence, and notwithstanding that the mother and her two elder sons made inquiries as to his whereabouts, they did not find out his address until they received the intimation of the accident which caused his death on April 22, 1911. He had evaded them for a year and seven months, and meantime they had maintained the pupil children in the fashion I have indicated.

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Under these circumstances, were the two younger children wholly dependent on the father's earnings within the meaning of the Workmen's Compensation Act, 1906? Acting on the view that they were in reality wholly so dependent, the sheriff-substitute assessed the compensation payable by the employers on account of the accident which caused the father's death at 21*l.* 9*s.*

My Lords, the First Schedule to the Act prescribes that the compensation shall, when death results from the injury, and the workman leaves any dependants wholly dependent on his earnings, be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury or the sum of 150*l.*, whichever of these sums is the larger, but not exceeding in any case 300*l.* The arbitrator has not, therefore, to calculate the amount of actual loss, but simply to ascertain whether there were left persons wholly dependent, and then to make the calculation which the statute directs. The only question is, therefore, whether the two younger children were wholly dependent. It is only if this question is answered in the negative that any question as to partial dependence can arise.

I am of opinion that the sheriff-substitute could properly hold that these children were wholly dependent. They had the right to look to their father for maintenance, and it is plain that those in whose care they were did so look, and endeavoured as best they could to make the right effective. The children had no other means of support which could render

their position one of partial dependence. It was only by assistance from their brothers, assistance which might have ceased at any moment, that they were saved from actual want. The father was under an obligation to maintain them which had already been enforced, and which might have been enforced again at any moment had he lived. Under these circumstances I think that the younger children could be held to be wholly dependent within the meaning of the Act of Parliament. The case is quite different from that of *New Monkton Collieries, Ltd. v. Keeling* (1), recently decided by this House. There, there had been what was tantamount to an abandonment of the wife's right. She had left her husband more than twenty years before his death, and had virtually given up looking to him for support for herself and her children. Here the wife had kept her right alive, and was apparently only waiting for the opportunity to enforce it. The obligation of the father remained in existence. It was a valuable asset, and she and the children had nothing else that was reliable to look to.

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The Lord Justice-Clerk says in his judgment that the true question is not, Had the applicant a legal right to maintenance by the deceased ? but, Was the applicant actually receiving support from one who was under an obligation to give support, and who was also the servant of the master whom it is proposed to make liable in compensation ?

My Lords, I cannot agree with this view of the true question. I agree that a mere legal right may not, in certain circumstances, be sufficient. It was held insufficient in the case before this House which I have quoted. The long period of desertion by the wife had so qualified it that, as Lord Atkinson pointed out, there was no evidence on which the arbitrator could properly find the fact of dependency.

Here I think there was evidence on which he could find that fact, and if this be so the finding of fact is conclusive. The true question in the present case is, in my opinion, whether there was, as one of the facts to be taken into account, an effective and valuable legal right. If there was such a right, and there was no legal difficulty in the way of enforcing it, then the mere fact

H. L. (SC.) that a want of opportunity to resort to it, which might have
 1913 proved only temporary, had reduced the mother and children
 POTS for the time to living on charity, cannot affect the conclusion
 v. that by the father's death they lost something on which they
 NIDDRIE could depend.
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I wish to add that I have, since the argument, examined the reported authorities. There has been a good deal of divergence in judicial opinion as to what dependency means. There has been a disposition to draw highly refined distinctions, and the decisions arrived at and the reasons for them have not been always consistent. I think that this tendency and its consequences will be lessened if it is borne firmly in mind that the question is always primarily one of fact, on which the conclusion of the arbitrator ought only to be set aside if it is apparent that there was no evidence to support it, or if error in law appears on the face of it. I am of opinion that this is what the Act of Parliament has laid down as the principle to be followed, and that the intention therefore was to confine the power of review by the Courts within the narrow limits I have indicated.

On the facts as found here I think that it was properly found that there was dependency within the meaning in which the word is used in the Workmen's Compensation Act, and I therefore move that the judgment appealed from be reversed, and that the award of the sheriff-substitute be restored.

LORD SHAW OF DUNFERMLINE. My Lords, the appellant is the widow of a miner named Robert Young, who met his death by accident sustained in a Mid Lothian coalpit in April, 1911. She sues for her two children, who are respectively eleven and eight years of age. The whole question in the case has reference to the sheriff's third finding, to the effect "that the said two pupil children were wholly dependent on the earnings of the said Robert Young at the date of his death."

My Lords, I apologize for repeating—one gets tired in repeating—that the matter of dependency—whether it exists, whether it is partial, and whether it is total—all these things are matters of fact, and that findings on them are findings in fact. It is accordingly impossible to disturb this verdict except

upon one of two grounds, either that the learned sheriff misdirected himself in some point of law, or that there was no evidence upon which his findings could legally rest. I am of opinion that neither ground of attack on the finding is good.

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The circumstances of the family were these: In March of 1907 Young deserted his wife and children, of whom there were four. The two elder children contributed to the family fund, the mother had occasional employment in charing and the like, and now and again the father gave his younger children two or three shillings when he met them on the road. After about two years Young went to Castlecary and a decree was obtained against him for payment of 15*l.* 12*s.* per annum for each of the two younger children. In September an arrestment was made of his wages, attaching 17*s.* He left the district to avoid further diligence, and in April, 1911, being at the point of death, he sent for his eldest son. A balance of wages, amounting to 2*l.* 18*s.*, was due to him at his death, and the appellant received that sum.

Upon these facts the sheriff made his finding. As he explains in the stated case, so far as the contributions by the two elder children were concerned, they were under no obligation to maintain the younger children and were not doing so ex pietate, and the sum contributed by them would have been recoverable from their father under the decree. No doubt this is elliptically put, but it is substantially true.

The learned judges of the Second Division have negatived the sheriff's finding, and have found on the contrary that the pupil children were neither wholly nor partially dependent upon their father at the date of his death. Their Lordships appear to have been largely led to this conclusion by a construction of the case of *Keeling*. (1) My Lords, that case, so far as the facts were concerned, was so widely different from the present as this, that for over twenty years the wife knew nothing of her husband, earned independently her own living, lived a completely separate life, and, as their Lordships in this House all thought, her independence either of her husband or anybody else was completely established in fact. And with regard to the law in *Keeling's Case* (1), it settled, and settled conclusively, that the

(1) [1911] A. C. 648.

H. L. (Sc.) mere fact of relationship will not raise such a presumption as by
 1913 itself to establish dependency. But it certainly did not settle,
 POTTs nor purport to settle, that relationship (or legal liability arising
 v. in consequence of that relationship) was to be excluded from the
 NIDDRIE view of the arbitrator as elements of fact in the case.
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COAL Lord Moulton, if I may say so, apprehended with complete
 COMPANY, correctness the true meaning of *Keeling's Case* (1) when he
 LIMITED. said, in *Lee v. Owner of Ship Bessie* (2), "In my opinion
 Lord Shaw of the effect of this decision is that legal obligations to support
 Dunfermline. must not be taken at their theoretic value, but at their practical
 value. For instance, the mere fact that a husband is bound to
 support his wife does not establish that she is totally or at all
 dependent upon him within the meaning of the Act if the
 circumstances are such that there is no reasonable probability
 that her rights would have been practically and effectually asserted.
 But if on the evidence there is any fair probability that the legal
 rights would at any future time have been actually and effectually
 asserted by the wife, then there is evidence of dependency, and
 the compensation must be regulated by an estimate of her practical
 loss subject to the provisions of the Act."

I feel loth, my Lords, to add anything to these words of Lord Moulton. But out of respect to the Court below I may point out that the opinions in *Keeling's Case* (1) placed in a very high position of authority the judgment of Lord Moncreiff in the case of *Sneddon* (3); and it may be well to quote the passage which I had fully in view when delivering judgment. Lord Moncreiff said: "There may be cases in which a husband's legal obligation to support his wife may be held to be sopited or suspended. But when that legal obligation, not discharged by the husband, concurs with total destitution on the part of the wife and inability to support herself, the bare fact that at the date of his death the husband was not implementing his obligation is not sufficient to prevent us from holding that the wife was wholly dependent on him. Neither, in my opinion, is the question affected by the fact that during the husband's absence and neglect the wife was kept from starvation by the casual charity of strangers, or even

(1) [1911] A. C. 648.

(2) [1912] 1 K. B. 83, at p. 88.

(3) 6 F. 992, at p. 996.

of relatives who might have been bound to support her if the husband had not been alive." My Lords, if that be the law, as I think it is, it does not appear to me possible to affirm that the learned sheriff-substitute has in any respect in this case misdirected himself.

With regard to the facts of a case of desertion, or refusal or omission to support dependants, these facts may be within a wide range. On the one hand, there may be a temporary absence of a husband or a father, with the expectancy of immediate aid on the part of those left behind. That is the one extreme. On the other hand, there may be a long absence entirely acquiesced in, and those left behind may live a separate and completely independent life, having no reliance whatsoever either upon support actually obtained or possible through the agency of the law. Between those two extremes there are many gradations, leaving room for the arbitrator to pronounce upon dependency—whether it is total or partial, or whether it exists. In the present case there was a resort to the law and a legal affirmation through the decree of dependency. Furthermore, there was evidence of a determination to vindicate the children's right to support. It was, as it were, proved that the wife was determined with regard to her children to shew her and their dependence upon him. There were circumstances of occasional support prior to the decree, and by reason of it. I cannot, all this being so, see my way to reverse the sheriff's finding pronounced in circumstances within the range of the extremes I have mentioned, and essentially upon a fact which a Court of law is not permitted to disturb.

I therefore concur in thinking that the appeal should be sustained.

LORD MOULTON. My Lords, I concur. In my opinion the point of law to be decided in this case is complementary to that which was the subject of the decision in this House in the case of *New Monckton Collieries, Ltd. v. Keeling*. (1)

In the latter case the Court of Appeal had decided that within the meaning of the Workmen's Compensation Act, 1906, a wife is presumed in law to be dependent on the earnings of a husband

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H. L. (Sc.) because he is under a legal obligation to maintain her, and that
 1913 therefore she is entitled as a dependant to compensation on the
 POTS death of her husband by accident, even though he was not in
 v. fact supporting her at the time, and there was no reasonable
 NIDDRIE probability that he would ever do so either voluntarily or under
 AND BENHAR compulsion. That decision was reversed by this House, and it
 COAL was established that the sums to be awarded under the Work-
 COMPANY, men's Compensation Act, 1906, are intended to be compensation
 LIMITED, for the pecuniary loss sustained by reason of the destruction of the
 Lord Moulton. deceased workman's power of earning. To put it in other words,
 this House decided that to establish a claim on the ground of
 dependency in the case of the death of a workman by accident it
 is necessary to shew an actual damnum to the dependant flowing
 from the death, and that the termination of a mere legal liability
 of no present or prospective value is insufficient to constitute or
 establish the existence of such a damnum.

In *Keeling's Case* (1) it was the widow of the deceased workman who put forward the claim for compensation as dependant. In the present case the claim is on behalf of two infant children, aged eleven and eight years respectively. This difference is, in my opinion, immaterial, as the facts of the present case shew that the deceased workman was under a legal liability to contribute to the support of the claimants, and where this is the case the law, as laid down in *Keeling's Case* (1), applies, and the question before the arbitrator is whether the right so possessed is of any actual or practical value. It follows, therefore, that if the claim of these infants upon their father to contribute to their support was not merely a theoretical claim, but one which might reasonably be expected to become effective to a greater or less extent, all the requisites of a valid claim under the statute are present.

This question is purely a question of fact, and the tribunal which in this case finally decides all questions of fact is the Sheriff's Court. An appeal from it can only be upon questions of law. But it has long been unchallenged law that the question whether there is no evidence in favour of a finding of fact is itself a question of law, although if there be any such evidence

the finding cannot be attacked on the ground that, in the opinion of the tribunal of appeal, the original tribunal should have come to a different conclusion on such evidence. In the present case the sheriff-substitute has found in favour of the claimants and has assessed the compensation at 216*l.* 9*s.* It is common ground that the question of quantum was entirely within the competence of the sheriff-substitute, whose jurisdiction in this respect was limited only by the provisions of the statute as to the maximum sum to be awarded. In his assessment of the compensation to be paid in this case he has not exceeded this maximum, which, as pointed out in the decision of this House in *Hodgson v. Owners of West Stanley Colliery* (1), applies both to the case of total and to that of partial dependency. It follows, therefore, that unless this House is prepared to decide, as a matter of law, that in the circumstances of the present case the claim of these infant children on their father for support possessed no actual or practical value, the decision of the sheriff-substitute in their favour must stand.

What, then, are the relevant circumstances in the present case? They are set out very clearly and tersely in the special case. The deceased workman deserted his wife in March, 1907, and went to reside elsewhere in the neighbourhood. During the next two years small sums were given by him to the children and their mother which pro tanto were contributions to their aliment. He then obtained employment as a miner at Castlecary, and as he was contributing nothing for the children, the mother, in June, 1909, consulted a solicitor in Falkirk, and through him made a demand on the workman for aliment of the two younger children. He promised to pay aliment but did not keep his promise. The mother then brought an action against him, and thereby obtained a decree entitling her to the custody of the infant children and granting decernitur against her husband for payment of the sum of 15*l.* 12*s.* per annum for each of the children, with legal interest until payment. The date of the decree was September 6, 1909, the first instalment being made payable on that date. The mother lost no time in enforcing the decree, and on September 23, 1909, arrested 17*s.* in the hands of

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her husband's employers. To avoid further enforcement of the decree, the workman left his employment, and undoubtedly tried to conceal his whereabouts from his family, and succeeded in so doing until he met with the accident which led to his death, on April 22, 1911. After the occurrence of the accident he himself sent for his eldest son, but died before his son could reach him.

It will be seen, therefore, that so far from the claim of the infants on their father for support having been allowed to remain in the position of a purely theoretical right, every step necessary to make it effective had been taken by the mother, and she had placed herself legally in a position where she possessed a summary remedy against the husband for the recovery of definite and substantial amounts in respect of each of the children. Moreover, she did not content herself with so doing, but, as the special case finds, she and her two sons, with the assistance of others, made all reasonable inquiries to ascertain the whereabouts of her husband for the purpose of enforcing the decree during the period of his final desertion of her. It is true that those inquiries had not yet been successful when the accident occurred from which he died. But, my Lords, it appears to me impossible for this House to decide that as a matter of law it was not open to the sheriff-substitute as judge of fact to attribute a substantial value to the probability that sooner or later the decree against the husband would be made productive. In other words, I think it is impossible for this House to say that there was no evidence that the father's legal obligation to support the children was, under the circumstances of the case, of some practical value to them.

It is not uninteresting in this connection to contrast the facts in the present case with those before this House in *Keeling's Case*.⁽¹⁾ There the wife had left her husband twenty-two years before his death, taking her children with her, and for the last twenty years had never communicated with him directly or indirectly, never made any claim upon him, and never received anything from him. She reared her children until they were married and placed out in life entirely on the earnings of her own labour. It is no wonder, therefore, that this House decided that (to use the words of Lord Atkinson) it was "impossible to

(1) [1911] A. C. 648.

come to the conclusion that there was any reasonable probability that she would ever enforce her right against her husband, or look to the result for her subsistence to any extent."

For these reasons I am of opinion that this appeal should be allowed, and that the original award of the sheriff-substitute as arbitrator should be restored.

J. B. Melville, for the appellant. With regard to the form of the order, it should have been stated in the appellant's case that, following upon the interlocutor of the Second Division, the case was remitted to the sheriff-substitute, who recalled his award. The appellant therefore asks that the interlocutor of the sheriff-substitute following upon the interlocutor of the Second Division should be recalled, and that the form of order adopted in *Low or Jackson v. General Steam Fishing Co.* (1) should be followed.

VISCOUNT HALDANE L.C. Then we will reverse the interlocutor of the Second Division and the consequential interlocutor of the sheriff-substitute.

Interlocutor of the Second Division of the Court of Session in Scotland reversed, together with the administrative interlocutor of the sheriff-substitute following thereon, and the award of the arbitrator thereby recalled restored. The respondents to pay the costs of the action in the Court of Session and of the proceedings in the Sheriff Court, from and after March 6, 1912 (the date of the interlocutor of the Second Division), and also the costs of the appeal to this House, the said costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 1, 1913.

Agents for appellant: *John Cuthbert, for R. & R. Denholm & Kerr, Solicitors, Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

(1) [1909] A. C. 523.

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 1913 LIMITED (IN LIQUIDATION) AND ANOTHER . } APPELLANTS ;
 June 3 ;
 July 4 . AND
 HIS MAJESTY'S POSTMASTER-GENERAL. RESPONDENT.

*Railway and Canal Commission—Appeal—Competency—Reference relating to
 Telephones—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25),
 s. 17, sub-ss. 1, 2, and 5—Telegraph (Arbitration) Act, 1909 (9 Edw. 7,
 c. 20), ss. 1 and 2.*

An appeal lies to the House of Lords from a decision of the Court of Appeal upon the question whether they have jurisdiction to entertain an appeal from the Railway and Canal Commission under s. 17 of the Railway and Canal Traffic Act, 1888.

By the Railway and Canal Traffic Act, 1888, the Railway and Canal Commission, which as regards England consisted of one ex officio and two appointed Commissioners, was established as a Court of record, and an appeal lay from the Commission to the Court of Appeal except upon questions of fact and locus standi.

By an agreement under seal made in 1905 a telephone company agreed to sell to the Postmaster-General all the plant in use by the company on December 31, 1911, and any dispute as to the value of the plant was to be referred to the Railway and Canal Commission if they should be authorized to determine it. The Telegraph (Arbitration) Act, 1909, enacted (s. 1) that any difference between the Postmaster-General and any body or person under any agreement relating to telephones should, if the parties agreed, be referred to the Railway and Canal Commission, who were bound to determine it; and (s. 2) that all proceedings relating thereto should be conducted by the Commission in the same manner as any other proceeding was conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, and that any order of the Commission on any such difference should be enforceable as any other order of the Commission, provided (inter alia) that any such matter of difference might, in certain events, be heard and determined by the two appointed Commissioners. A difference having arisen as to the value of the plant, the Commission, at the request of the parties, fixed and determined the value:—

Held, that the reference to the Commission under the Telegraph

* *Present*: VISCOUNT HALDANE L.C., EARL LOREBURN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

(Arbitration) Act, 1909, was a reference to them as a Court of record and not as arbitrators, and that an appeal lay from their decision on a point of law to the Court of Appeal.

Decision of the Court of Appeal [1913] 2 K. B. 614, affirmed.

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APPEAL from an order of the Court of Appeal. (1)

By an agreement under seal dated February 2, 1905, and made between the respondent, the Postmaster-General, and the appellants, the National Telephone Company, Limited, as altered by a supplemental agreement between the same parties dated August 8, 1905 (which agreement as so altered is hereinafter referred to as the purchase agreement), it was agreed that the Postmaster-General should buy and the company should sell all the plant in use by the company on December 31, 1911.

The value of the said plant was to be ascertained in the manner directed by clause 4 of the purchase agreement, and by sub-clause 4 of clause 4 all matters of difference arising under that clause were to be determined by arbitration.

By clause 15, "all questions and matters of difference referred to arbitration by or under this agreement shall be referred to the Railway and Canal Commission if that body shall be authorised to entertain the same." And the clause provided that in the event of the Railway and Canal Commission not being authorized to entertain any such question the provisions of the Arbitration Act, 1889, should apply to the determination thereof.

The Railway and Canal Commission, which as regards England consists of an ex officio and two appointed Commissioners, was established by the Railway and Canal Traffic Act, 1888, in lieu of the Railway Commissioners appointed under the Regulation of Railways Act, 1873, and was made a Court of record (s. 2); and by s. 17 it was provided (sub-ss. 1 and 2) that an appeal should lie from the Commission to the Court of Appeal except upon any question of fact or locus standi, and (sub-s. 5) that the decision of the Court of Appeal should be final.

The Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), enacted as follows:

Sect. 1. "Any difference between the Postmaster-General and

H. L. (E.) any body or person under the Telegraph Acts, 1863 to 1908, or
 1913 under any licence or agreement relating to telegraphs (including
 NATIONAL telephones), shall, if the parties to such difference have before the
 TELEPHONE passing of this Act agreed, or hereafter agree, to such reference, be
 COMPANY, referred to the Railway and Canal Commission, and that Commis-
 LIMITED sion shall determine the same.”
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Sect. 2. “All proceedings relating to any difference directed to be determined by the Railway and Canal Commission under this Act shall be conducted by the Commission in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, or any Act amending the same, and any order of the Commission on any such difference or question shall be enforceable as any other order of the Commission: Provided—

- (1.) that any matter of difference or any question arising before the Commission under this Act may, in the discretion of the Commission and with the consent of the parties, be heard and determined by the two appointed Commissioners, whose order shall be deemed to be the order of the Commission; and
- (2.) that the costs of every proceeding before the Commission shall be in the discretion of the Commission.”

On February 9, 1912, differences having arisen between the company and the Postmaster-General as to the value of the company's plant, the company applied to the Railway and Canal Commission to settle the amount, and on January 31, 1913, the Commission made their determination fixing the value of the plant.

The Postmaster-General appealed to the Court of Appeal upon two points of law arising upon the determination of the Commission. The company served a cross-notice of appeal, if and so far as an appeal should be open to them, and they took the preliminary objection that no appeal would lie inasmuch as the case had been heard by the Commission, not as a Court of record, but as arbitrators.

The Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Buckley L.J. dissenting) overruled the preliminary objection and held that they had jurisdiction to entertain the appeal.

1913. June 3. *Sir Alfred Cripps, K.C., Danckwerts, K.C.,* H. L. (E.)
and *H. H. Gaine*, for the appellants.

Sir Rufus Isaacs, A.-G. (with him *Sir John Simon, S.-G.,*
Buckmaster, K.C., W. G. S. Schwabe, and G. A. H. Branson), for
the respondent, took the preliminary objection that no appeal
would lie from the decision of the Court of Appeal.

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The decision of the Court of Appeal that it was competent to
them to entertain the respondent's appeal is final, inasmuch as
it is a decision by the Court in the exercise of their statutory
jurisdiction as the final Court of Appeal from the Court of the
Railway and Canal Commission.

VISCOUNT HALDANE L.C. If the Court of Appeal wrongly
usurped jurisdiction surely there must be an appeal to this House
on that point. Their Lordships will reserve their decision upon
the preliminary objection until the appellants have argued their
case.

Sir Alfred Cripps, K.C., and Danckwerts, K.C. (with them
H. H. Gaine), for the appellants. No appeal lies from a deter-
mination of the Railway and Canal Commission under the
Telegraph (Arbitration) Act, 1909. The reference contemplated
by that Act is to the arbitration of a specified tribunal and is not a
reference to the Commission as a Court of record. The authority
of the Commissioners arises from the consent of the parties
and the statute only makes it the duty of the Commissioners to
act on such contractual authority. Therefore some such section
as s. 2 was required to determine the procedure on such a
reference. Upon the construction put upon the Act by the
majority of the Court of Appeal, the greater part of s. 2 becomes
mere surplusage. If the reference is to the Commission as a
Court of record, it was unnecessary to provide that the pro-
ceedings relating to any difference under this Act should be
conducted in the same way as any other proceeding was con-
ducted under the Railway and Canal Traffic Acts, 1873 and 1888,
or that the order of the Commission on any such difference should
be enforceable as any other order of the Commissioners, because
those consequences followed as a matter of course from the

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previous Acts. Further, the conduct of proceedings referred to in s. 2 is limited to procedure within the walls of the Court itself and has no reference to the right of appeal. Sect. 8 of the Act of 1873 in providing for the reference of certain classes of differences between railway and canal companies to the Commissioners says that they shall be "referred to the Commissioners for their decision in lieu of being referred to arbitration." The Act of 1909, which is called an "Arbitration" Act, contains no such language, and the inference is that under this Act the Commissioners are the arbitrating tribunal. Moreover, under this Act the matter may be determined, if the parties so agree, without the ex officio Commissioner, whereas under the Act of 1888 the ex officio Commissioner, who is a judge of the High Court, must always preside, and an appeal from the Commissioners is really an appeal from the judge. That is an additional argument in support of the view that this is an arbitration and that consequently s. 17 of the Act of 1888, which gives a right of appeal from the Commissioners, does not apply. [They referred to the Regulation of Railways Act, 1873, ss. 8, 9, 19, 26; the Railway and Canal Traffic Act, 1888, ss. 2, 5, 8, 15, 17, 18; the Appellate Jurisdiction Act, 1876, s. 3; and *North Eastern Ry. Co. v. North British Ry. Co.* (1)]

A right of appeal is a substantive right which must be granted by express statutory authority; it cannot be given by mere implication: *Attorney-General v. Sillem* (2); *Colonial Sugar Refining Co. v. Irving* (3); *Rex v. Hanson* (4); *Reg. v. Stock*. (5)

Sir Rufus Isaacs, A.-G., Sir John Simon, S.-G., Buckmaster, K.C., W. G. S. Schwabe, and G. A. H. Branson, for the respondent, were not called on.

VISCOUNT HALDANE L.C. Their Lordships are unanimously of opinion that the preliminary objection of the Attorney-General cannot succeed, but that, the appeal having been opened and argued, no case has been made which renders it necessary for

(1) (1897) 25 R. 333; 10 Ry. & Ca. Tr. Cas. 82.

(2) (1864) 10 H. L. C. 704, at p. 724.

(3) [1905] A. C. 369.

(4) (1821) 4 B. & Ald. 519.

(5) (1838) 8 Ad. & E. 405.

them to call upon the Attorney-General. They think that the appeal fails and they will give reasons in writing hereafter for that conclusion, but as the case is one which ought to be disposed of at once they propose formally to dismiss the appeal.

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July 4. Their Lordships now delivered their opinions as follows :—

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VISCOUNT HALDANE L.C. (1) My Lords, the question before the House may be stated very shortly. The appellants entered into an agreement to sell to the respondent certain assets the value of which was, if necessary, to be determined by arbitration. The agreement provided that any question or matter of difference referred to arbitration was to be referred to the Railway and Canal Commission if that body should be authorized to entertain it. In the event of the Commission not being so authorized the provisions of the Arbitration Act, 1889, were to apply.

A difference having arisen under the agreement, the Commission, at the request of the parties, sat and determined it, and fixed the value of the assets in question. The respondent appealed to the Court of Appeal on certain points included in this decision. Before the appeal was opened the appellants took the objection that the Court of Appeal had no jurisdiction to entertain it. The majority of the Court of Appeal, consisting of the Master of the Rolls and Kennedy L.J., held that there was jurisdiction. Buckley L.J. dissented.

The ground of the objection was that the Commission had jurisdiction only by virtue of the agreement and of the Telegraph (Arbitration) Act, 1909, and not under the Regulation of Railways Act, 1873, as amended by the Railway and Canal Traffic Act, 1888, neither of which Acts by itself applied to the case. The 17th section of the Act of 1888 gives a right of appeal to the Court of Appeal, excepting where the questions are of fact or of locus standi; but it is said that the Telegraph Arbitration Act enables a reference to the Commission, not as the Court of record established under the two general Acts I have referred to, but as a body of arbitrators from whom there is no appeal.

My Lords, s. 17, sub-s. 5, takes away the ordinary right

(1) Read by Earl Loreburn.

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of appeal to this House from decisions of the Court of Appeal in cases of appeal to it from the Commissioners, and the Attorney-General contended that in consequence the appeal now brought to this House was incompetent. I am of opinion that this preliminary objection fails. The real question is whether the judgment of the Court of Appeal was a nullity, and not whether that Court erred in a proceeding competent under s. 17 of the Act of 1888. I think that in such a case there is nothing to take away the general right of appeal to the House of Lords conferred by s. 3 of the Appellate Jurisdiction Act of 1876.

My Lords, the substantial question in the case turns on the construction of the Telegraph (Arbitration) Act, 1909. That Act provides, by s. 1, that any difference of a kind which includes the present case shall, if the parties agree to such reference, be referred to the Commission, and the Commission is bound to entertain the question. Sect. 2 enacts that such a proceeding shall be conducted in the same manner as any other proceeding is conducted by the Commission under the Acts of 1873 and 1888, subject to the proviso that by consent, and if the Commissioners approve, the question may be determined by the two appointed Commissioners instead of the whole body. It is contended by the appellants that in a reference under this Act the Commission is not in the same position as in a reference under the general Acts establishing it, and that, as no right of appeal is expressly given, none can be presumed.

My Lords, if the reference is one on the same footing as a reference under the general Acts, that is, a reference to the Commission as a Court of record, with a right of appeal expressly provided, this is decisive against the points raised in the argument for the appellants. And I find nothing in the Act of 1909 to cut down the effect of the words at the end of s. 1, which appear to me to provide for a reference to the Commission in its usual capacity. When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches. It is said that if this be so the first

part of s. 2 was superfluous. I do not think so. The initial words of that section appear to me to have been put there by the draftsman in order to lay a foundation for the proviso under which certain cases may be heard by two Commissioners. The proviso is a sufficient reason for the words being inserted, and there is to my mind no justification for reading them as introduced for the purpose of cutting down the natural meaning of the language of s. 1.

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Upon these grounds I arrived, after hearing the argument, at the conclusion that the appeal ought to be dismissed.

EARL LOREBURN. My Lords, I took part in the case and I also think that the appeal ought to be dismissed.

LORD ATKINSON. (1) My Lords, I concur.

The Railway Commissioners were appointed by the Regulation of Railways Act of 1873 (36 & 37 Vict. c. 48). Very extensive jurisdiction was conferred upon them by that statute. By the 6th section they were empowered, on a complaint being made to them, to deal, against the will of a railway company, with many matters, such as undue preferences alleged to have been given by the company.

Where the provisions of any general or special Act passed before or after this statute of 1873 authorized or required that a difference between two railway companies or between two canal companies, or between a railway company and a canal company, should be referred to arbitration, s. 8 provided that that difference should, on the application of one party to the dispute, be, with the consent of the Commissioners, referred to them for their decision in lieu of arbitration. The Commissioners were thus bound to deal with a question such as a complaint of undue preference, brought before them presumably by a party aggrieved, whether they liked it or not. They had no power to refuse to do so. Under the 8th section they, if they so consented, were bound to decide a difference brought before them at the instance of one of the parties, and it might be against the will of the other.

By the 9th section any difference to which a railway company

(1) Read by Lord Parker of Waddington.

H. L. (E.) or a canal company was a party might, on the application
1913 of both the parties to the dispute, be referred to the Com-
missioners for their decision, provided they consented to that
NATIONAL course. This last is obviously what has been described in
TELEPHONE argument, quite rightly, as a purely consensual arbitration.
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The Commission had the further power in proceedings under
either of these two sections 8 or 9 to state a case, if they should
think fit, on any question, which in their opinion was a question
of law, for the opinion of a superior Court. They had no option
of the kind here given in proceedings under ss. 6, 11, 12, and 13.
In these latter instances they were bound to state a case if
required. The important point, however, to consider is that
this mode of access to a superior Court of law was provided
under the terms mentioned in each and every of the several
classes of proceedings with which the Commissioners had to
deal, and in which they had to adjudicate.

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By the 8th section of the Act of 1888, all the powers vested in or capable of being exercised by the Railway Commissioners under the Act of 1873 are vested in the new Commissioners appointed by the former statute, and I think there can be no doubt that from the passing of that statute the new Commissioners had full jurisdiction to entertain and decide each of the several classes of cases mentioned in ss. 6, 8, and 9 of the Act of 1873; and moreover that under s. 17 of the Act of 1888 an appeal not dealing with a question of fact or locus standi would lie from their decision in each of those classes of cases. But s. 9 of the Act of 1873 deals with consensual arbitration, and nothing else. In no case could the Commissioners be arbitrators to whom the parties had by consent referred their differences more absolutely than they are under this section, and yet while so acting they are so far treated as a Court of law that an appeal lies from them, as of right, to the Court of Appeal. The fact that the Commissioners are selected by the agreement of the parties to decide, and are not bound to act, is not then, in my view, at all crucial, and does not determine the question whether the matter referred to them is to be dealt with by them in their character of a Court of law, or purely in their character of arbitrators.

Somewhat similar considerations apply to s. 18 of the Act of 1888. It does not seem to be open to doubt that the three Commissioners could commit for contempt of Court arising in a proceeding under s. 9 of the Act of 1873.

Now the parties in the present case have agreed that the matters in difference in this particular controversy shall be referred to arbitration. Sect. 1 of the Telegraph (Arbitration) Act, 1909, therefore applies. Like the 9th section of the Act of 1873, it provides that the parties must agree to refer to the Commissioners, but, unlike that section, it provides that the Commissioners shall determine the matters referred. My Lords, if the matter stood there I think it would be clear that this section only added another item to the several matters which the Commissioners have already power as a Court of law to determine just as they determine as a Court of law matters arising under s. 9 of the Act of 1873. It is not, in substance, in my view, at all a question of giving a right of appeal by implication. It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law. It is urged, however, that the construction of s. 1 here suggested cannot be adopted, inasmuch as express provision is in s. 2 made for the mode in which the proceedings are to be conducted by the Commissioners, and that this would have been unnecessary if s. 1 had the meaning suggested. Well, it may be that this provision in s. 2 is unnecessary and was introduced *ex abundante cautela*. The same remark, however, does not apply to sub-ss. 1 and 2 of this section, and I find nothing in these latter inconsistent with the contention that matters referred have been referred to the Commissioners as a Court of law. If they are not a Court of law, but purely arbitrators, then the Arbitration Act of 1889 would apply, with absurd results. It seems to be an unsound construction which would place these Commissioners in the anomalous position of persons exercising all the powers of a Court of law and yet not being a Court of law, and in the position of arbitrators yet untouched by the provisions of the Arbitration Act.

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The decision of the Court of Appeal was therefore, in my opinion, right, and should be upheld, and this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. The only point determined by the Court of Appeal and submitted to your Lordships' House was whether that Court correctly determined that an appeal was competently brought before it from a certain judgment of the Railway and Canal Commission. That judgment was pronounced in these circumstances :

It was agreed that His Majesty's Postmaster-General should buy, and the National Telephone Company should sell, the plant, land, buildings, business, and stores of the latter. It was by the purchase agreement provided by section 4, sub-section 4, that all matters of difference as to values should be determined by arbitration. And then, by section 15, it was stipulated as follows: That "all questions and matters of difference referred to arbitration by or under this agreement shall be referred to the Railway and Canal Commission if that body shall be authorised to entertain the same." It was further provided that, in the event of the Commission not being so authorised, "the provisions of the Arbitration Act, 1889, shall apply to the determination of such question."

The event—of the Railway and Canal Commission being authorized to entertain such a reference—took place by the passing of the Act of October 20, 1909. By s. 1 of that Act it was provided that any difference such as has arisen "shall, if the parties to such difference have before the passing of this Act agreed, or hereafter agree, to such reference, be referred to the Railway and Canal Commission, and that Commission shall determine the same."

As to the proceedings before the Railway and Canal Commission on such a reference, there were provisions made that, in the discretion of the Commission, and if both parties agreed, the two appointed Commissioners should hear and determine any matter of difference or question. The parties have not so agreed.

The second point of procedure was that the Commission was given a discretion as to costs. No question arises as to that.

Beyond these two small points the provision of s. 2 of the Act of 1909 was absolute that all proceedings covered by the statute and referred to the Railway and Canal Commission "shall be conducted by the Commissioners in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts."

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It appears to me, my Lords, that in these circumstances the Railway and Canal Commission was by the combined operation of the agreement and the special Act of Parliament fully and entirely charged with the settlement of differences arising under the indenture between the parties. I think that it was also so to this special extent, that, when it became possessed of the cause so referred, that cause fell to be determined according to the rules and methods of the ordinary procedure of the Commission and it became subject to all the provisions of the Acts of 1873 and 1888, including those as to appeal.

By s. 5, sub-s. 3, of the latter statute it is provided that not less than three Commissioners shall attend at the hearing of any case and the ex officio Commissioner shall preside, and his opinion upon any question which, in the opinion of the Commissioners, is a question of law shall prevail. I am of opinion that this item of procedure also applies to the case in hand. It does not appear to me doubtful that, a question of law having arisen, the provisions of s. 17, sub-s. 2, of the statute of 1888 also apply, namely, "save as otherwise provided by this Act" (that is to say, saving questions of fact and locus standi), "an appeal shall lie from the Commissioners to a superior Court of Appeal."

In the general case, when a Court of record (which the Railway and Canal Commission is by the Act of 1888, s. 2,) becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a Court ensue.

The argument is that the Railway and Canal Commission only became possessed of the reference as arbitrators privately agreed to by the parties. It would, of course, have been open under the indenture for the parties to put such limits upon the powers of their arbitrator, namely, the Commission thus selected, or to settle the points of finality or procedure which they agreed to be

H. L. (E.) specially observed, and it would have been open to Parliament to
 1913 permit the Commission to act within such limits. But where
 NATIONAL these things have not been done the Court of record must follow
 TELEPHONE its own and its authorized lines. It does not, in my opinion,
 COMPANY, matter whether you call the Railway and Canal Commission a
 LIMITED statutory Commission or an arbitral tribunal. The result is the
 v. same. I do not hesitate in adopting the language of Lord
 POSTMASTER- M'Laren in *North Eastern Ry. Co. v. North British Ry. Co.* (1)
 GENERAL. when that learned judge said, "Whether this is arbitration or juris-
 Lord Shaw of diction, there lies, in my view, an appeal under s. 17 of this Act
 Dunfermline. of 1888, because it is not said that an appeal shall lie from a legal
 decision of the Commissioners, or that an appeal shall lie under
 certain conditions, but that 'save as otherwise provided by this
 Act an appeal shall lie from the Commissioners,' that is, from
 every act of the Commissioners done under statutory authority,
 save as otherwise provided."

It being thus determined that the judgment of the Court of Appeal in sustaining the competency of an appeal from the Railway Commission to it is a sound judgment, and it being agreed that, if this is so, the opinion of the Court of Appeal upon the merits will be final, the other point suggested by the learned Attorney-General, with reference to the impossibility of an appeal to this House, does not arise.

LORD MOULTON. (2) My Lords, the Railway and Canal Commission is a tribunal originally established by the Regulation of Railways Act, 1873, the constitution and powers of which were modified substantially by the Railway and Canal Traffic Act, 1888. As at present constituted for England it consists of a judge of a superior Court assigned thereto by the Lord Chancellor and two appointed Commissioners who are laymen.

The business assigned to the Commission initially related exclusively to matters affecting railway companies or canal companies, but the suitability of a Commission, consisting partly of legal and partly of lay elements, has shewn itself so markedly that from time to time the Legislature has assigned to

(1) 25 R. 333, at p. 343; 10 Ry. & Ca. Tr. Cas. 82, at p. 112. (2) Read by Lord Shaw of Dunfermline.

it other matters, in some cases making the consent of all parties a condition precedent to the jurisdiction of the Commission in the matter, and in other cases enabling the Commission to entertain it on the application of one of the parties.

The present case relates to the valuation of the plant, &c., of the National Telephone Company, Limited, taken over by the Post Office under the provisions of an agreement dated February 2, 1905 (modified by a supplemental agreement dated August 8, 1905), for the purchase of the plant, property, and assets of the company.

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By the statute 9 Edw. 7, c. 20, s. 1, it was enacted as follows :

“Any difference between the Postmaster-General and any body or person under the Telegraph Acts, 1863 to 1908, or under any licence or agreement relating to telegraphs (including telephones), shall, if the parties to such difference have before the passing of this Act agreed, or hereafter agree, to such reference, be referred to the Railway and Canal Commission, and that Commission shall determine the same.”

It is common ground that the present dispute comes within this section, and that the parties thereto have agreed to its being referred to the Railway and Canal Commission, and therefore that the above section is operative.

To gain a clear notion of the point which your Lordships are asked to decide, it will be necessary to refer shortly to the course of the litigation. After a protracted hearing the Railway and Canal Commission gave their decision, fixing the amount to be paid by the Postmaster-General. From that decision the Postmaster-General appealed to the Court of Appeal upon certain points of law, and on the appeal coming on for hearing, a preliminary objection was taken on behalf of the National Telephone Company that the Commissioners in hearing and deciding the matter in dispute were acting as arbitrators only and not as a Court, and that consequently there was no appeal from their decision. The Court of Appeal, by a majority, decided that they were competent to entertain the appeal, and from that decision the present appeal is brought.

The sole question therefore for decision is whether the Railway and Canal Commission, when acting under the powers of the

H. L. (E.) section quoted above, are acting as a Court. To my mind the language of the section leaves no room for doubt on this point. The matter is referred to "the Railway and Canal Commission," i.e., to a well-known Court, named by its statutory name. In such a case the prima facie and natural meaning of the language used is that it is referred to the Court as such, and any one who would maintain that the true meaning is that it is referred to the existing personnel of the Court as arbitrators merely has to face so strong a presumption in favour of the ordinary meaning of the language that, in order to succeed in his contention, he must shew that other portions of the enactment relating thereto establish beyond all reasonable doubt that his contention is correct.

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I will proceed to examine the grounds on which it is suggested that your Lordships ought to hold that it is to the Commissioners sitting as arbitrators, and not to the Court, that the statute proposes to refer the matter in dispute.

In the first place attention was called to the short title of the Act, namely, the "Telegraph (Arbitration) Act, 1909," and it was urged that this gave countenance to the contention that the reference was merely an arbitration. With regard to this I adhere to the opinion which I expressed in my judgment in the case of *Vacher & Sons v. London Society of Compositors* (1), namely, that, while it is admissible to use the full title of an Act to throw light upon its purport and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience of reference and whose object is identification and not description. The full title of the Act under consideration is "An Act to give further powers to the Railway and Canal Commission to determine differences with respect to Telegraphs (including Telephones)," and if it has any bearing on the question it emphasizes the argument that the reference is to the Court as such, seeing that it refers to it by its statutory title.

In the second place it was suggested that the fact that the statute requires the parties to consent to the Commission deciding upon the matter indicated that the proceeding was of the nature

(1) Ante, p. 107.

of an arbitration. I am wholly unable to understand the meaning or relevancy of this. The consent of the parties is no doubt a condition precedent, but if that condition precedent is satisfied its existence can have no effect on the nature or consequences of the reference.

But the main contention on behalf of the appellants was based upon the language of s. 2 of the Telegraph (Arbitration) Act, 1909. Inasmuch as this constituted the bulk of the argument addressed to us on behalf of the appellants, I will quote the section in full. [His Lordship read the section.]

It was contended in the first place that if the reference is to the Court as a Court it was unnecessary to say that the proceedings should be conducted by the Commission in the ordinary way. The conclusive answer to this is that the object of the section was to provide that in certain respects the ordinary mode of proceeding should be departed from. There are two obvious methods of drafting a clause providing for this. In the one form you provide that the order of the proceedings shall be the same as usual with the exception of the specific points which are to be altered. In the other form you provide for the procedure on these specific points and add that in other respects the order of proceeding shall not be altered. Which of the two shall be chosen is a matter of the fancy of the draftsman, and no legitimate conclusions as to the construction of the provision can be drawn from his choice.

Lastly, it was contended that if it had been a reference to the Court as a Court it would have been unnecessary to enact that "any order of the Commission on any such difference or question shall be enforceable as any other order of the Commission."

My Lords, I do not trouble myself to decide whether or not this specific provision was necessary or not. It may well be that the draftsman thought that the decisions of the Commissioners on some of the very varied matters which could be referred to them under the powers given by the Act might have peculiarities of nature and effect which might raise a doubt as to whether the award could be treated and enforced in the same way as orders made by the Commission in the course of its ordinary work, and that therefore it was better to insert a specific

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H. L. (E.) provision to the above effect. But whether that was the reason
 1913 of his inserting the provision or not, there is nothing in the
 NATIONAL TELEPHONE COMPANY, LIMITED provision itself which is in the slightest degree inconsistent with
 POSTMASTER-GENERAL. the Commission acting as a Court, and therefore it fails entirely
 v. to rebut the strong prima facie presumption to which I have
 referred above.

Lord Moulton.

For these reasons I am of opinion that the reference was to the Court as such, and that accordingly the general provisions as to appeal from that Court apply to the decision in the present case. It follows therefore that this appeal should be dismissed with costs.

LORD PARKER OF WADDINGTON. My Lords, the question to be determined on this appeal depends entirely on the true construction of s. 1 of the Telegraph (Arbitration) Act, 1909. That section provides that any difference between the Postmaster-General and any body or person under the Telegraph Acts, 1863 to 1908, or any licence or agreement relating to telegraphs (including telephones), shall, if the parties to such difference have before the passing of this Act agreed, or shall thereafter agree, to such reference, be referred to the Railway and Canal Commission, and that that Commission shall determine the same.

The Railway and Canal Commission is a Court of record having jurisdiction under the Regulation of Railways Act, 1873, and the Railway and Canal Traffic Act, 1888. In matters of difference within s. 8 of the former Act its jurisdiction can be invoked by any party to the difference. In matters of difference within s. 9 of the same Act its jurisdiction can be invoked only with the consent of both parties. Under the 17th section of the Act of 1888 there is in every case a right of appeal from its decision unless such right (as in the case of questions of fact or locus standi) is expressly negatived.

Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.

The only question is whether s. 2 of the Telegraph (Arbitration) Act, 1909, contains anything to modify what would be otherwise the effect of s. 1. Possibly s. 2 contains provisions which, if s. 1 has the effect above indicated, might have been omitted. But those provisions may be readily explained as having been inserted ex abundanti cautela, or as having been introduced with a view to the particular modifications in the procedure of the Court which that section undoubtedly contemplates. It does not appear to me to be consonant with sound principles of construction to cut down the plain meaning and effect of one section of an Act because, if this meaning and effect be given to the section, certain provisions of another section might be otiose.

I agree that this appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 3, 1913.

Solicitor for appellants: *William E. Hart.*

Solicitor for respondent: *Solicitor to the Post Office.*

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[HOUSE OF LORDS.]

H. L. (L.)* HOLLINSHEAD AND ANOTHER APPELLANTS;
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 AND
 July 3. P. AND H. EGAN, LIMITED RESPONDENTS.

Bankruptcy—Reputed Ownership—Bill of Sale—Bankruptcy of Grantor before Default in Payment—Bills of Sale (Ireland) Act (1879) Amendment Act, 1883 (46 Vict. c. 7), s. 7—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 313.

Where the grantor of a registered bill of sale framed in conformity with the Bills of Sale Acts is adjudicated a bankrupt before making any default in payment of the sums thereby secured, the goods comprised in the bill of sale are, in the absence of evidence displacing the reputation of ownership, in the possession, order, and disposition of the bankrupt as reputed owner thereof with the consent and permission of the true owner within the meaning of s. 313 of the Irish Bankrupt and Insolvent Act, 1857.

In re Ginger [1897] 2 Q. B. 461, and *In re Hayes* [1899] 2 I. R. 206, followed and approved.

In re Stanley (1886) 17 L. R. Ir. 487, overruled.

Order of the Court of Appeal in Ireland [1912] 2 I. R. 170, reversed.

APPEAL from an order of the Court of Appeal in Ireland reversing an order of the King's Bench Division (in bankruptcy) of the High Court of Justice in Ireland. (1)

The appellants were the assignees in bankruptcy of William Henry Harvey. The respondents were the grantees of a bill of sale dated June 2, 1911, and made between Harvey of the one part and the respondents of the other part, whereby Harvey assigned to the respondents the chattels set forth in the schedule by way of security for the payment of the sum of 75*l.* and interest thereon at the rate of 5*l.* per cent. per annum and agreed to pay to the respondents the principal sum aforesaid together with the interest then due by equal payments of 37*l.* 10*s.* on December 1, 1911, and June 1, 1912; and the bill

* *Present*: EARL LOREBURN, LORD ATKINSON, and LORD MERSEY. LORD ASHBOURNE was present during the argument, but died before the judgment.

(1) [1912] 2 I. R. 170.

of sale contained a proviso that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the respondents for any cause other than those specified in s. 7 of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883.

The bill of sale was duly registered on June 7, 1911. On August 15, 1911, Harvey was adjudicated a bankrupt. On the following day, August 16, the respondents seized the chattels comprised in the schedule to the bill of sale under the powers conferred upon them by s. 7, sub-s. 2, of the Act of 1883.

On January 12, 1912, the appellants moved the King's Bench Division (in bankruptcy) for an order declaring that the bankrupt at the time he became bankrupt had by the consent and permission of the true owner thereof in his possession, order, or disposition the goods and chattels comprised in the schedule to the bill of sale, of which goods and chattels the bankrupt was the reputed owner, and for an order that the goods and chattels might be sold and disposed of for the benefit of the creditors under the bankruptcy.

The motion was heard before Boyd J. sitting in bankruptcy. That learned judge, following a previous decision of his own, *In re Hayes* (1), in which he adopted the English decision in *In re Ginger* (2) in preference to the previous Irish decision in *In re Stanley* (3), made an order in the terms of the notice of motion.

On February 19, 1912, the Court of Appeal in Ireland (Barry L.C., Holmes and Cherry L.JJ.), following *In re Stanley* (3), reversed the order of Boyd J. and refused the motion.

1913. April 21, 22. *Ronan, K.C.* (of the Irish and also of the English Bar), and *E. Clayton, K.C.* (with them *R. Doyle, K.C.*, and *F. Denning*, both of the Irish Bar), for the appellants. The question is whether goods comprised in a bill of sale which provides that the grantor shall remain in possession until default are, on the bankruptcy of the grantor before any payment is due under

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(1) [1899] 2 I. R. 206.

(2) [1897] 2 Q. B. 461.

(3) 17 L. R. Ir. 487.

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the bill of sale, in the reputed ownership of the bankrupt. It has been decided in England that they are—*In re Ginger* (1)—and in Ireland that they are not: *In re Stanley*. (2) The doctrine of reputed ownership is of ancient origin and depends upon statute law: *In re Lovering*. (3) The first statute on the subject was passed in 1623, 21 Jac. 1, c. 19, s. 11, but all the statutes require that the goods shall be in the apparent possession of the bankrupt with the consent of the true owner. It is a sufficient consent within the meaning of these reputed ownership clauses if it is given by the terms of the deed by which the goods are mortgaged or, as was done in many of the earlier cases, by means of a redemise of the goods to the grantor: *Bryson v. Wylie* (4); *Lingham v. Biggs* (5); *Horn v. Baker* (6); *Freshney v. Carrick* (7); *Hornsby v. Miller* (8); *Spackman v. Miller*. (9) In *Ashton v. Blackshaw* (10) Malins V.-C. expressed obiter the view that if the grantor was in possession under a deed which allowed him to remain in possession until default, the possession being in conformity with the terms of the deed, apparent ownership and disposition did not apply; and this opinion was quoted by Sir James Bacon in *Ex parte Homan* (11) without disapproval; but in the subsequent case of *Ex parte Harding* (12) that learned judge expressly repudiated his former decision, and the dictum of Malins V.-C. has been disapproved in all the editions of Williams on Bankruptcy.

Soon after the passing of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and the corresponding Irish Act (17 & 18 Vict. c. 55), which provided for the first time for the registration of bills of sale, the question was raised whether registration under those Acts did not take the goods out of the reputed ownership of the bankrupt, but the authorities shew that those Acts were passed alio intuitu and did not narrow the application of the doctrine of reputed ownership: *In re Daniel* (13); *In re O'Connor* (14) (a

- (1) [1897] 2 Q. B. 461.
- (2) 17 L. R. Ir. 487.
- (3) (1874) L. R. 9 Ch. 621.
- (4) (1784) 1 Bos. & P. 83, n.
- (5) (1797) 1 Bos. & P. 82.
- (6) (1808) 9 East, 215; 2 Sm. L. C. (11th ed.) 232.
- (7) (1857) 1 H. & N. 653.

- (8) (1858) 1 E. & E. 192.
- (9) (1862) 12 C. B. (N.S.) 659.
- (10) (1870) L. R. 9 Eq. 510, at p. 515.
- (11) (1871) L. R. 12 Eq. 598.
- (12) (1873) L. R. 15 Eq. 223.
- (13) (1855) 25 L. T. (O.S.) 188.
- (14) (1856) 27 L. T. (O.S.) 27.

decision on the Irish Act); *Stansfeld v. Cubitt* (1); *Badger v. Shaw*. (2) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 20, the policy of the Legislature was reversed and it was provided that chattels comprised in a bill of sale should not be deemed to be in the order or disposition of the grantor. But by the Bills of Sale Act of 1882 (45 & 46 Vict. c. 43), s. 15, s. 20 of the Act of 1878 was repealed. Similar provisions were contained in the same sections of the corresponding Irish Acts of 1879 and 1883 (42 & 43 Vict. c. 50 and 46 & 47 Vict. c. 7), which were practically identical with the English Acts.

In *Swift v. Pannell* (3) Fry J. held upon the construction of s. 15 of the Act of 1882, having regard to the fact that the Act of 1878, which was described in the Act of 1882 as the principal Act, applied to bills of sale given by way of absolute transfer as well as to bills of sale given by way of security, whereas the operation of the Act of 1882 was confined to bills of sale by way of security, that the repeal of s. 20 of the Act of 1878, though in terms absolute, applied only to bills of sale by way of security, and this decision was approved by the Court of Appeal in *Heseltine v. Simmons*. (4) The effect of that decision was to restore the ordinary law of reputed ownership as to bills of sale by way of security. In *In re Stanley* (5), which has been adopted by Barry L.C. and Cherry L.J. in the present case, Judge Miller, in considering the Irish Acts, took yet another view of the construction of the repealing section and held that s. 20 of the earlier Act was repealed only so far as it was inconsistent with the later Act; and he held further, having regard to s. 7 of the Act of 1883, which prohibited a grantee from seizing the goods comprised in the bill of sale except (inter alia) upon the bankruptcy of the grantor, that the grantee, being only a restricted owner of the goods, was not competent to give any consent as to the possession of the goods by the grantor. That judgment is founded partly upon a misapprehension of the effect of s. 15 of the Act of 1883 and partly upon the discredited dictum of Malins V.-C. in *Ashton v. Blackshaw*. (6) The whole of that reasoning is

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(1) (1858) 2 De G. & J. 222.

(2) (1860) 2 E. & E. 472.

(3) (1883) 24 Ch. D. 210.

(4) [1892] 2 Q. B. 547, at p. 552.

(5) 17 L. R. Ir. 487.

(6) L. R. 9 Eq. 510.

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unsound and the effect of it is to reduce the repealing section to a nullity. That judgment was not appealed against because the bill of sale was held void upon another ground. Sect. 7, sub-s. 2, of the Act of 1883 does not in terms enable the grantee to seize the goods on the bankruptcy of the grantor, but is expressed negatively. But assuming that that sub-section conferred by implication the power to seize on bankruptcy, it was not intended to derogate from the rights of outside general creditors, but merely to regulate the relations between the parties to the bill of sale. Upon this construction the section would still operate in many cases, as where the goods are not in the reputed ownership of the grantor by reason of custom, or where the grantee marks the goods or takes some other precaution to displace the presumption of reputed ownership. Again, under the English Bankruptcy Act of 1883 the order and disposition clause does not apply to non-traders or to traders except as to goods in their possession in their trade or business, but the Irish Bankrupt and Insolvent Act, 1857, contains no such limitations. In *In re Ginger* (1) the Divisional Court declined to follow *In re Stanley* (2) as being inconsistent with *Spackman v. Miller*. (3) *In re Ginger* (1) was followed in Ireland in 1899 by Boyd J. in *In re Hayes* (4), which has regulated the practice in that country ever since, and it ought to be preferred to *In re Stanley*. (2)

Cave, K.C., and *Blood, K.C.* (the latter of the Irish Bar) (with them *Stephen O'Brien*, of the Irish Bar), for the respondents. The right way to approach this question is first to take the statute itself and ascertain its meaning, and then to reconsider the decisions by the light of the statute. Upon the appellants' construction s. 7 of the Act of 1883 is nothing but a trap, and the practical effect of that construction is to destroy the validity of every bill of sale upon the bankruptcy of the grantor. Although the causes for which the goods may be seized are expressed negatively, the proviso at the end of the section does in terms treat those causes as causes for which seizure may be made, and the true reading of the section is that the goods may be seized

(1) [1897] 2 Q. B. 461.

(2) 17 L. R. Ir. 487.

(3) 12 C. B. (N.S.) 659.

(4) [1899] 2 I. R. 206.

in any of the five events mentioned: *In re Morritt*. (1) That section may be regarded either as being, in effect, affirmative or as negating consent or permission. It is absurd to say that, where the statute prevents possession being taken by the owner, the owner consents to the grantor being in possession. The grantee enters into a contract and then the law prevents him from taking possession. In a sense he is the true owner, but he was never the true owner with the right to give or withhold permission. He becomes the true owner only by entering into a relation which deprives him of the power to withhold permission. How then can it be said that the possession of the bankrupt is not according to right or that the possession is not where it ought to be? The cases of reputed ownership imply that the true owner has been guilty of some impropriety in leaving the goods in the possession of the bankrupt: *Hamilton v. Bell* (2); *Colonial Bank v. Whinney* (3); *Joy v. Campbell*. (4) The grantee is not the true owner in the full sense of the term because ownership involves the right to possession, and it is in that sense that the term is used in s. 313 of the Irish Bankruptcy Act. The ownership is split up: *Thomas v. Searles*. (5) The effect of the Bills of Sale Act of 1883 is to make the grantee only a limited owner and not the true owner for the purpose of giving consent. There can be no consent because there is no mens volens. The law on the question at issue is not settled in either country. In *Craucour v. Salter* (6) Malins V.-C. adhered to the view which he had expressed in *Ashton v. Blackshaw* (7), that when a deed is duly registered all the property comprised in it is taken out of the order and disposition of the bankrupt, and those two cases are in direct conflict with *In re Ginger*. (8) It is not unreasonable to require a creditor to take the trouble to search the register of bills of sale in order to find out the truth. [They also referred to *Ex parte Rose* (9) and *In re Webber* (10),

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(1) (1886) 18 Q. B. D. 222, at p. 241.

(2) (1854) 10 Ex. 545, at p. 551.

(3) (1886) 11 App. Cas. 426, at p. 442.

(4) (1804) 1 Sch. & Lef. 328.

(5) [1891] 2 Q. B. 408, at p. 412.

(6) (1881) 18 Ch. D. 30, at p. 42.

(7) L. R. 9 Eq. 510.

(8) [1897] 2 Q. B. 461.

(9) (1841) 2 Mont. D. & De G.

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(10) (1891) 64 L. T. 426.

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reversed on appeal July 14, 1891, as stated in Baldwin's Law of Bankruptcy, 9th ed., p. 381, n.]

Ronan, K.C., replied.

The House took time for consideration.

July 3. EARL LOREBURN. My Lords, the facts of this case are very simple. On June 2, 1911, Mr. Harvey gave a bill of sale over his chattels to Egan, Limited, as security for 75*l.* and interest. The loan was to be repaid by instalments. It was an assignment in the statutory form and provided that the grantees should not seize or take possession of the chattels except for the causes provided by s. 7 of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883, one of which is default by the grantor, and another is his bankruptcy. On August 15, 1911, when there had been no default, Harvey, the grantor of the bill of sale, became bankrupt, being at that time in possession of the chattels as the bill of sale intended that he should be. Thereupon his assignees in bankruptcy claimed the chattels under the reputed ownership section of the Irish Bankruptcy Act. The grantees of the bill of sale claimed them under the bill of sale assignment of June 2. And your Lordships have to determine which of these titles is to prevail. Boyd J. decided for the assignees in bankruptcy. But his decision was reversed by the Court of Appeal in Ireland.

Let me begin by examining the title of the assignees in bankruptcy under the reputed ownership clause. In order to bring this clause into operation three things have to be made good. First, that at the date of the bankruptcy these chattels were in possession, order, or disposition of Harvey. Of that there is, and can be, no question in this case. Secondly, it must appear that they were in his possession, order, or disposition by the consent and permission of the true owner. Now, the true owners were Egan & Co., Limited, who had agreed by the bill of sale that he should be in possession. But it was argued, and the argument derives weight from the very high authority of the Court of Appeal, that he was not in possession at the material date by the consent and permission of Egan, Limited, because he was entitled to be in possession whether they liked it or not by virtue of s. 7 of the Bills of Sale Amendment Act, 1883.

It is quite true that until the bankruptcy took place Harvey was entitled to remain in possession, for the section cited prohibits the grantees from seizing or taking possession until the occurrence of some events none of which had occurred, and this prohibition is not only enacted in the section but is also stipulated for in the bill of sale itself. With all respect, however, I cannot see how this circumstance alters the fact that at the date of the bankruptcy Harvey was in possession by the consent and permission of Egan & Co. They could not take a valid bill of sale without consenting to his remaining in possession in accordance with the section. But if they made, as they did make, that contract they consented to those terms. In my opinion they did consent, none the less that they could not make the contract at all without consenting. This view is in accordance with the settled rule in English Courts upon a similar statute ever since *Ginger's Case* (1) in 1897, and has been the settled rule in Ireland ever since *Hayes' Case* (2) in 1899. And if this is not the law, then the bankruptcy law of reputed ownership is little more than a dead letter as to chattels comprised in a bill of sale.

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The third thing that the assignees in bankruptcy must make good is that Harvey was in possession as reputed owner. Now there was evidence to shew that he was so. The learned judge of first instance found that he was so. Counsel were unable to say that he was even asked to find the contrary. It was admitted that the Court of Appeal were not asked to find the contrary. Upon the evidence we have, I think the judge of first instance was entitled to come to that conclusion. If he had doubted or been asked to hold differently he might have asked for further evidence. And it was the same with the Court of Appeal. Under these circumstances I can see no ground for interfering with the finding.

Accordingly all the points necessary to establish the title of the assignees in bankruptcy have been made good, and they must prevail unless some better title is put forward by the grantee of the bill of sale.

Mr. Cave, on behalf of the grantee, did endeavour to put forward such a title. He referred to s. 7 of the same Bills of Sale

(1) [1897] 2 Q. B. 461.

(2) [1899] 2 I. R. 206.

H. L. (I.) Act, 1883, and said that it conferred upon the grantee a right to
 1913 seize these chattels on the bankruptcy of the grantor, and that if
 ~~~~~ he did seize he was entitled to them in priority to the assignees  
 HOLLINS- in bankruptcy. Now the section provides that the grantee of a  
 HEAD bill of sale may not seize or take possession unless some events  
 v. happened, one of which is the grantor's bankruptcy. This is  
 P. AND H. turned upside down in the argument, and is treated as equivalent  
 EGAN, to a positive enactment that he may seize and take possession  
 LIMITED. and hold the chattels against the assignees in bankruptcy, if  
 Earl Loreburn. there is a bankruptcy.

There are several answers to this contention. To say that a man may not seize unless a particular event happens is a very different thing from saying that he may seize if it does happen. Again, even if the Act says positively that he may seize, that is a very different thing from saying that his doing so shall give him a right to hold and keep against a third party who has a title under another Act of Parliament. The truth is that this section simply regulates the terms upon which bills of sale are to be given, but does not mention or affect whatever right any other person may have against either party to the bill. To regard it as conferring a title upon the grantee against the assignees in bankruptcy is to do a violence to its language which upon a plain reading of the language is inadmissible, and also would pervert the sense to something which is altogether outside the scope of an enactment designed merely to impose terms upon parties to a bill of sale.

For these reasons I think the appeal should be allowed.

I take it that the parties would consider that the order of Boyd J. should be restored.

LORD ATKINSON. (1) My Lords, the facts of this case have been sufficiently stated by my noble friend on the woolsack.

By the order of the Irish King's Bench Division it was declared that the bankrupt at the time of his bankruptcy had with the consent and permission of the true owner of the goods in the bill of sale mentioned, possession of the same as reputed owner thereof. It was contended before the Court of Appeal,

(1) Read by Lord Parker of Waddington.

apparently with success, and again before your Lordships, that on the true construction of the 7th section of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883, the King's Bench Division was either prohibited from arriving at the conclusions of fact embodied in this declaration, or that notwithstanding them the title of the grantee on the bill of sale should prevail. These are really the main if not the sole questions for decision. If that Court was not so prohibited, then in my view there was before it abundant evidence to sustain those conclusions.

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The bill of sale, which was practically in statutory form, contained the following proviso :—" Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said P. and H. Egan, Limited, for any cause other than those specified in section 7 of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883."

On August 15, 1911, before the first instalment was due, William Henry Harvey was adjudicated a bankrupt.

The Irish Bills of Sale Act of 1883 is practically identical in its terms with the English statute of the previous year, the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43).

In the year 1897 the case of *In re Ginger, Ex parte the London and Universal Bank* (1) was decided. In that case a dairy farmer in consideration of an advance of money, and as a security therefor, executed a bill of sale dated February 28, 1896, on his cows, horses and other farming stock, and furniture to the above-mentioned bank, the principal sum being repayable with interest by two payments on May 28 and August 28 then following. He continued in possession and occupation of his farm and carried on therein his trade and business of a dairy farmer with the above-mentioned stock. While so engaged he, the grantor, was, on May 11, before the first of the instalments had become due or any default made, just as in the present case, adjudicated a bankrupt. The county court judge, before whom the case came in the first instance, held that this stock was at the time Ginger became bankrupt in his, Ginger's, order and disposition as reputed owner with the consent of the true owner thereof, within the meaning of the Bankruptcy Act, 1883, s. 44, sub-s. iii., and that the proceeds of the

(1) [1897] 2 Q. B. 461.

H. L. (I.) stock which had been sold formed part of the estate of the bankrupt divisible amongst his creditors.

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The case came on appeal before Vaughan Williams J., as he then was, and Wright J. Numerous authorities were cited to them, including *Freshney v. Carrick* (1), *Spackman v. Miller* (2), *Colonial Bank v. Whinney* (3), and an Irish case (1886), *In re Stanley*. (4) The former learned judge in a judgment, the reasoning of which appears to me to be absolutely convincing, held, as I read his judgment, (1.) that the construction of the Bankruptcy Act of 1883 was absolutely unaffected by the Bills of Sale Act of 1882, that both statutes were of equal force, and that it could not be argued that the reputed ownership clause of the Bankruptcy Act of 1883 was controlled by the statute of 1882; (2.) that the question of reputed ownership is a question of fact, to be decided on the facts of each case; (3.) that the grantee's consent to the grantor's retaining possession of the goods assigned by the bill of sale may be validly given by that instrument itself; and (4.) that a provision in such a bill of sale that the grantor may remain in possession until a future day, or until the happening of a future event, is a valid consent within the meaning of the 7th section of the Bills of Sale Act of 1882, even though the consent should not be revocable before that day arrives, or that event occurs. At p. 465 of the report the learned judge expresses himself thus: "Apart from the bill of sale no one would hesitate to say that the possession of the bankrupt here was such as to bring the case within the 44th section of the Bankruptcy Act. Then what difference does the bill of sale make? It is said that because the Act of Parliament requires a certain form to be used, and prescribes certain consequences of giving a bill of sale, that negatives the presumption that the possession of the grantor is by the consent of the true owner. I do not see why that should be so."

He then proceeds to point out that the Bills of Sale Act applies to all classes of persons, the reputed ownership clause of the Bankruptcy Act to traders alone and to goods in their order and disposition in their "trade or business," and consequently that there are many cases in which bills of sale will enure for the

(1) 1 H. & N. 653.

(2) 12 C. B. (N.S.) 659.

(3) 11 App. Cas. 426.

(4) 17 L. R. Ir. 487.

benefit of the grantee despite the subsequent bankruptcy of the grantor, such as where (1.) the goods included in the bill of sale are not goods in the possession or disposition of a trader "in his trade or business"; or (2.) where, though they be in the trader's possession or disposition in his "trade or business," custom will override the presumption of reputed ownership. At p. 466 he states the ultimate conclusion at which he had arrived thus: "The conclusion to which I come is that in each case, notwithstanding the provisions of the Bills of Sale Act, 1882, the question will be, Is the possession by the bankrupt by consent of the true owner, and under such circumstances that the bankrupt is the reputed owner of the goods? It seems to me that, although the Bills of Sale Act compels the grantee to allow the grantor to remain in the possession of the goods, it does not in any sense compel him to consent to a false representation of ownership. If the surrounding circumstances are not such as to raise a reputation of ownership on the part of the grantor of the bill of sale, then the enforced consent by the grantee to the possession of the goods does no harm, and the reputed ownership clause does not apply. But if the surrounding circumstances are such as to raise the reputation of ownership on the part of the grantor, then the grantee must go further and take such steps as are necessary to negative the reputation of ownership."

At p. 467, Wright J. expresses himself thus: "I am of the same opinion. There is nothing in the Bills of Sale Act, 1882, to exclude the operation of the reputed ownership clause, unless it be that by s. 7 the consent of the true owner to the possession is done away with. But I think, on the authority of *Spackman v. Miller* (1), that we must hold that the consent of the true owner to the goods remaining in the possession of the grantor is given by the bill of sale itself. No doubt s. 7 of the Bills of Sale Act, 1882, recognizes that the bill of sale is enforceable in bankruptcy; but that can only mean to give the grantee of a bill of sale an effective power of seizure in cases where the reputed ownership clause does not apply."

On the point of the concurrent and independent operation of the Bankruptcy Act of 1883, and the Bills of Sale Act of

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H. L. (I.) 1882, this decision is in complete accord with the opinion expressed by Turner L.J. in *Stansfield v. Cubitt* (1), and with the decision of the Court of Queen's Bench, adopting that opinion, in *Badger v. Shaw*. (2)

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In the second of these cases, Hill J., at p. 484, says: "Then, does the mere fact of the registration of a bill of sale per se make the change of real ownership so notorious that the reputed ownership thereby ceases? If it does, the provision at the end of s. 125 of the Bankrupt Act, that the section shall not invalidate the transfer or assignment of any ship or any share thereof, made by way of mortgage or assignment duly registered, would be perfectly idle; for the registration of such a security would, according to that view, take it out of the operation of the statute without any enactment to that effect." The provisions of the 313th section of the Irish Bankrupt and Insolvent Act, 1857, dealing with reputed ownership differ materially from those of the 44th section of the English Bankruptcy Act of 1883, but the former section contains provisions as to a registered mortgage of a British ship similar to those contained in the 125th section of the English Bankruptcy Act, with which Hill J. was dealing in the above quoted passage. And though provisions to a similar effect are not to be found in the Bankruptcy Act of 1883, they are to be found in the 22nd section of the Merchant Shipping Act of 1854, and the 36th section of the Merchant Shipping Act of 1894, so that the reasoning of the learned judge as to registration not rendering, by its notoriety, the "reputed ownership clause inapplicable to such a security, applies to the existing law in both England and Ireland. The decision on the second point is in conformity with the decision of Lord Selborne in *Ex parte Watkins* (3), approved of by your Lordships' House in *Colonial Bank v. Whinney* (4), and also in conformity with the decision of the Court of Appeal in the case of *In re William Watson & Co., Ex parte Atkin Brothers*. (5)

On the third point the decision is in complete harmony with

(1) 2 De G. & J. 222.

(3) (1873) L. R. 8 Ch. 520, at p. 528.

(2) 2 E. & E. 472.

(4) 11 App. Cas. 426, 434.

(5) [1904] 2 K. B. 753.

the decisions of Lord Mansfield in *Bryson v. Wylie* (1), of Eyre C.J. in *Lingham v. Biggs* (2), of the Court of Exchequer in *Freshney v. Carrick* (3), and *Spackman v. Miller*. (4) In each of these cases there was only one deed. In each of two of them the chattels were redemised to the grantor. This was held to be a mere device to evade the statute, and though bad as a demise, good as a consent by the grantee to the grantor retaining possession. In the last-named case Willes J. (at p. 680) says the authorities shew that it is indifferent whether the acquisition of the goods and the redemise of them are one transaction or are effected by different instruments.

And the decision on the last point is merely an application of the ordinary principle that unless the minds of both parties to a contract assent to each of its terms there is no contract. If a statute enacts that a clause of a certain kind shall be taken to be embodied in every contract of a particular character, then each party who enters into such a contract must be taken to have consented to be bound by the provisions of that clause, quite as effectually as if those provisions had, independently of the statute, been introduced into the contract at his own instance.

This case of *In re Ginger* (5) must now therefore be regarded as a high authority. In the sixteen years which have elapsed since it was decided it has never been questioned. It has been accepted as having settled the law on the points with which it deals. In the year 1899 the learned judge who exercises bankruptcy jurisdiction in Ireland, and who decided the present case in the first instance, having found that both Vaughan Williams J. and Wright J. had in *Ginger's Case* (5) expressed the opinion that the decision in a previous Irish case, *In re Stanley* (6), was erroneous, declined to follow the Irish authority, and in the case of *In re Hayes* (7) based his judgment on *In re Ginger* (5), and ruled the case in conformity with it. From the year 1899 to the present decision, fourteen years, the decision *In re Hayes* (7) had been accepted and followed.

(1) 1 Bos. &amp; P. 83, n.

(4) 12 C. B. (N.S.) 659.

(2) 1 Bos. &amp; P. 82.

(5) [1897] 2 Q. B. 461.

(3) 1 H. &amp; N. 661.

(6) 17 L. R. Ir. 487.

(7) [1899] 2 I. R. 206.

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The effect of the decision appealed from is to revive the authority of *In re Stanley* (1) so long discredited. And it is therefore necessary to examine critically the judgment of the learned judge, Judge Miller, who decided that case. It is a mistake to suppose that that learned judge founded his judgment on the proposition of law laid down by Malins V.-C. in *Ashton v. Blackshaw* (2), a decision approved of apparently unintentionally by Sir James Bacon in *Ex parte Homan* (3), and rather disapproved of by the same judge, it would seem, in *Ex parte Harding*. (4) That proposition is to the effect that, where the permission to retain possession of the goods granted by a bill of sale is given by the terms of the deed itself, and is therefore in conformity with the deed, the doctrine of reputed ownership does not apply, but where not in conformity with the deed it does apply. This is, in my view, contrary to a whole stream of authority, from *Bryson v. Wylie* (5) downwards, and is not founded on any legal or rational principle. Judge Miller, so far from adopting this decision, pointed out how difficult it would be to apply it. What he founded and built up his whole judgment upon was a misconstruction of the 15th section of the Bills of Sale Act of 1883, a misconstruction so obvious that the able and distinguished counsel who appeared for the respondents on this appeal declined to argue in support of it. The 20th section of the English Bills of Sale Act of 1878 enacted that "Chattels comprised in a bill of sale which has been, and continues to be, duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869."

Sect. 20 of the Irish Bills of Sale Act of 1879 is identical in terms with this section of the English Act, save that the words "within the meaning of the Irish Bankrupt and Insolvent Act, 1857, or of any Act altering or amending the said Act" are substituted in the former for the words "within the meaning of the Bankruptcy Act, 1869," occurring in the latter. The 15th section of the English Act of 1882 is identical in terms

(1) 17 L. R. Ir. 487.

(3) L. R. 12 Eq. 598.

(2) L. R. 9 Eq. 510.

(4) L. R. 15 Eq. 223.

(5) 1 Bos. & P. 83, n.

with the 15th section of the Irish Act of 1883. Both run thus: "The eighth and twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed," &c. The principal Act in the one case is the Act of 1878 and in the other the Act of 1879. Well, Judge Miller at p. 500 of the report purports to quote the above quoted portions of s. 15 of the Act of 1883, but the punctuation is altered—a comma is inserted after the word "Act," where it occurs for the second time—and he then construes the section as if the words "which are inconsistent with this Act" applied to the repeal of the 8th and 20th sections of the principal Act. The repeal of the 8th and 20th sections is plainly absolute and unqualified. It has always been held so to be under the English Act. The qualifying words plainly refer to the words "all other enactments contained in the principal Act," not to the opening words of the section. The thing is not arguable, and was not argued on this appeal. Yet Judge Miller dealt with the whole matter at p. 500 of the report thus. He said: "It will thus be plainly seen that those two sections (8th and 20th) of the Act of 1879—of the principal Act—were repealed and made to end only so far as to make them conformable to the secondary or amending Act of 1883."

And again, at p. 505: "The 20th section of the Act of 1879, which excludes the operation of that 313th section (the reputed ownership section) altogether as regarded duly registered bills of sale, is one repealed by the Act of 1883, so far as it is inconsistent with the Act of 1883, and the Act of 1883 having, by the 7th section of that Act, expressly prohibited all grantees under bills of sale from seizure or taking possession of chattels comprised in bills of sale, except for the five causes specified in that 7th section, all grantees under bills of sale were only restricted owners of the chattels comprised in their bills of sale, until some of such five causes for seizing or taking possession of such chattels had arisen, and a grantee was therefore neither in a position to seize nor give possession of any of such chattels which he had not in himself, or as a necessary consequence, to give any consent or permission as to the possession of any such

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H. L. (I.) chattels. And, secondly, as the 313th section of the Act of  
 1913 1857, above referred to, is founded altogether on a possession  
 HOLLINS- conferred by a person capable of giving possession as their true  
 HEAD owner. . . .”

P. AND H. The true ground of his decision is therefore this, that under  
 EGAN, these enactments, as he construes them, the grantee of a regis-  
 LIMITED. tered bill of sale of a date later than the year 1883 was not a true  
 Lord Atkinson. owner capable of giving consent to the possession of chattels by  
 a grantor as reputed owner within the meaning of the 313th  
 section of the statute of 1857.

I do not know whether the Court of Appeal in Ireland have adopted this construction of s. 15 of the Act of 1883, but their decision would, it appears to me, in all cases of bills of sale given since the passing of that statute as security and duly registered go far to repeal, in effect, the first portion of this repealing section, and set up again in full force s. 20 of the principal Act.

Now I turn to the 7th section of the Act of 1883. It does not prescribe what a bill of sale shall contain, nor does it in effect insert any provision into a bill of sale, but it does prescribe what the parties to a bill of sale must not introduce into it. There is nothing to prevent the parties to such an instrument contracting that the chattels assigned shall not be seized or taken possession of by the grantee for one or more of the causes mentioned in sub-ss. 1, 2, 3, 4, and 5 of this section. Mr. Cave, as I understood him, admitted this. But assuming that the proviso at the end of the bill of sale in this case amounts to an agreement binding on the parties to it, as between themselves, that the grantee shall be at liberty to seize and take possession of the chattels covered by the bill for any of the causes mentioned in s. 7, it by no means follows that that agreement should be permitted to defeat the paramount title of the assignees in bankruptcy under s. 313 of the Act of 1857, or should enable the parties, though guilty of the very deception against which this section, so revived, was directed, to contract themselves out of the consequences. I have not heard and have not been able to find anything to lead me to think that the opinion expressed by Turner L.J. in *Stansfield v. Cubitt* (1) was not sound, or that the cases of *Badger v. Shaw* (2)

(1) 2 De G. & J. 222.

(2) 2 E. & E. 472.

and *In re Ginger* (1) were not well decided, or that the English Bills of Sale Act of 1882 “in any degree narrowed the application of the doctrine of reputed ownership.” I have, then, to ask myself what special provision is there in the Irish Bankruptcy Code which compels me to hold that the Irish Act of 1883, identical in terms with the English Act of 1882, narrows the application of that doctrine to such an extent as, in the case of a bill of sale such as the present, to practically repeal that section of the Irish Act of 1857, which was specially framed to apply this doctrine.

The respondents contend that this special provision is to be found in this, that s. 313 of the Irish Act is far wider in its reach than s. 44, sub-s. iii., of the English Bankruptcy Act of 1883, the latter applying only to bankrupt traders, and to goods in their possession in “their trade or business,” whatever that may mean, while the former applies to both bankrupts and insolvents, and to goods of whatever kind which may be in their possession at the times indicated. I cannot think that this undoubted extension of the application of the doctrine of reputed ownership furnishes any justification for adopting a construction of the 7th section of the Act of 1883 which, as to all bills of sale of this character, would put both Irish bankrupt traders and Irish insolvents altogether beyond the reach of this just and wholesome doctrine. It is urged on behalf of the respondents that if the construction of this 7th section which they contend for be not adopted, there will not be any bills of sale of this class to which that section can apply—that it will be abortive. This is, I think, a mistake. It will not apply admittedly to some of those securities to which the corresponding section of the English Act does apply, but it will apply to all bills of sale given as securities for money where the grantees refrain from putting the grantors into a position to gain a reputation of ownership of property contrary to the truth, to the possible misleading and deceit of those with whom they deal and from whom they get credit. If the grantees in such bills of sale in Ireland cannot devise some means, in addition to registration, by which the fact that they did not consent to the grantor’s being left in possession of

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(1) [1897] 2 Q. B. 461.

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his former goods as owner can be proved, then the evil, if evil it be, must be met by legislation, not by putting a forced and, in my view, at least, an unsound construction on a section of an existing statute. I therefore think that the decision appealed from was wrong and should be reversed, and that of the King's Bench Division should be restored, and this appeal should be allowed with costs.

LORD MERSEY. My Lords, the facts of this case are not in dispute, and they raise only one question, which is whether the reputed ownership section (313) of the Irish Bankruptcy Act has operated to displace the respondents' bill of sale title. If it has so operated, the order of the learned judge directing the goods to be sold for the benefit of the general body of creditors should be restored, otherwise the judgment of the Court of Appeal should stand.

The conditions which authorize an order for sale are to be found in the section itself, the words of which are: "If any bankrupt, at the time he becomes bankrupt . . . shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner . . . the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors." The contention of the respondents is that the material condition that the possession must be with the consent and permission of the true owner never existed, and that therefore the section never applied. This contention is founded on s. 7 of the Bills of Sale (Ireland) Act (1879) Amendment Act, 1883, which provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee except for certain causes specified, one of which is "if the grantor shall become a bankrupt." It is argued that inasmuch as the law prevents the grantee from taking possession himself before the bankruptcy he cannot be said to have consented to the grantor having possession. In my opinion this is a fallacy. The bill of sale contract was undoubtedly made with the consent of the grantee, and that consent, I think, involved a consent to all the legal incidents of the contract, one of which was that the goods should remain

and continue in the possession of the grantor. It is then said that the intention of s. 7 was to give the grantee a title notwithstanding the bankruptcy; that the property in the goods was already in the grantee of the bill of sale, and that the Legislature by the Bills of Sale Act gave him in addition, in the event of a bankruptcy, a right to complete his title by taking possession. I am disposed to agree with the contention that s. 7 gives a right to seize in the event of bankruptcy; but it is a right to seize as against the grantor; it is not a right to seize as against a third party, such as the general body of creditors, nor has it anything to do with questions of title. Then it is said if that be so the right to seize is meaningless and it is impossible for the grantee under a statutory bill of sale such as this is to secure himself against the risk of the grantor's bankruptcy. I do not, however, agree. It is always open to the grantee of such a bill of sale to avoid the effect of the reputed ownership section of the Bankruptcy Act by giving proper public notice that the goods are not the grantor's goods. Such a notice will defeat the object of the lender and the borrower if that object be to keep the transaction secret. But then so it should. On the other hand, it will give the grantee an unimpeachable title, and s. 7 of the Bills of Sale Act will give him a right to seize at once. The truth of the matter is that the Bills of Sale Act has nothing whatever to do with the question of reputed ownership. Neither in terms nor by necessary intendment does it in any way affect the bankruptcy enactment. I think the appeal should be allowed.

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*Order of the Court of Appeal in Ireland reversed  
and order of Boyd J. restored. The respondents  
to pay the costs in the Courts below and also  
the costs of the appeal to this House.*

*Lords' Journals, July 3, 1913.*

Solicitors for appellants: *Ellis & Ellis, for Hoey & Denning,  
Dublin.*

Solicitors for respondents: *Hammins, Grammer & Hammins, for  
Thomas Conway, Dublin.*



## [HOUSE OF LORDS.]

H. L. (E.)\* SIR JOHN WOLFE BARRY, K.C.B. . . . . APPELLANT ;  
 1913  
 July 24, ELIZA THEODORA MINTURN. . . . . RESPONDENT.

*London—Building—Party Structure—Defective Party Wall—Making good or repairing—London Building Act, 1894 (57 & 58 Vict. c. cccxiii.), ss. 88, 90, 91.*

The tribunal adjudicating under the London Building Act, 1894, upon a dispute between a building owner and an adjoining owner as to the mode of repairing a defective party wall is not entitled to take into consideration the previous history of the wall.

Dictum of Bankes J. in *Minturn v. Barry* [1911] 2 K. B. 265, overruled.

The right conferred by the Act upon the building owner to make good a party structure which is defective or out of repair is confined to making good the party structure so that it becomes effective for the purposes for which it is actually used or intended to be used, and in determining the proper way of making good the defect the tribunal is to have due regard to the convenience of the adjoining owner.

Dampness in a wall is not a defect within the meaning of the Act unless it renders the wall less effective for the purposes for which it is used or intended to be used; it is not a defect in a wall between two gardens.

A wall which divided the gardens of two adjoining houses in London was utilized for the retaining wall of an extension made to one of the houses. The owner of the extended house complained that the dampness of the party wall affected the basement of her extension and proposed as building owner under the London Building Act, 1894, to enter upon the premises of the adjoining owner and make good the party wall on his side. A difference having arisen under the Act, the county court judge, upon an appeal from an award of the statutory tribunal, found that the party wall was defective in that it allowed damp to percolate into the building owner's basement, but that effective work for preventing the damp could be done on her side of the wall, and held, having regard to the previous history and user of the wall, that no work should be permitted on the adjoining owner's side; and he directed that the building owner should be at liberty from her side of the wall to insert a vertical damp course in the middle of the wall:—

*Held*, that the judge had misdirected himself in holding that he could

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\* *Present*: EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD PARKER OF WADDINGTON.

have regard to the previous history of the wall, but that the remedy proposed by him was a making good of the wall within the meaning of the Act, and that in the circumstances the misdirection was not a ground for ordering a new trial.

Order of the Court of Appeal, so far as it ordered a new trial [1912] 3 K. B. 510, reversed.

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### APPEAL from an order of the Court of Appeal. (1)

The respondent, Miss Minturn, hereinafter called the plaintiff, was the owner in fee simple in possession of No. 14, Chelsea Embankment. At the time when this litigation commenced the appellant, hereinafter called the defendant, held the adjoining house, No. 15, Chelsea Embankment, under a lease from the London County Council, who were the freeholders, but in 1911 he purchased the freehold from the council. These two houses faced the river Thames on the south, No. 14 being on the east and No. 15 on the west. In 1883 the plaintiff's predecessor in title extended No. 14 to the north, the extension being about fifteen feet long from south to north. In making this extension the wall separating the gardens of the two houses was utilized as part of the west wall of the extension and for that purpose was thickened on its east side by four and a half inches. The soil in the garden of No. 15 remained at its original level, but the soil in the garden of No. 14 was excavated to a depth of eight feet. The extension consisted of a servants' hall in the basement and a cupboard adjoining it, a billiard room on the ground floor, and two other rooms above that. In 1909 negotiations were entered into between the plaintiff and defendant with reference to the percolation of moisture into the plaintiff's servants' hall owing to the damp condition of the party wall, which the plaintiff alleged to be due to the existence of a large virginia creeper on the defendant's side of the wall, but these negotiations proved abortive. On June 2, 1910, the plaintiff, as building owner within the meaning of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), served on the defendant a party structure notice under s. 90, sub-s. 1, of the Act, stating that she intended after two months to exercise her rights under s. 88 (2), and, among other

(1) [1912] 3 K. B. 510.

1894 (so far as material), provides :—

(2) The London Building Act, Sect. 88: "The building owner

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things, to enter upon No. 15, dig down to the foundations of the party wall, and, if there were no damp-proof course, insert a horizontal damp-proof course, for the full thickness of the wall, and build upon the defendant's side of the wall a vertical damp-proof course; also to repoint the brickwork on the defendant's side. She also served a similar notice upon the London County Council; but, inasmuch as the council ceased to take any active part in these proceedings after the purchase of the freehold of No. 15 by the defendant, this notice need not be further referred to.

A difference having arisen between the parties, surveyors were appointed in accordance with s. 91, sub-s. 1, of the Act.

The surveyors awarded that the party wall was not so far defective or out of repair within s. 88 as to necessitate any works being done under a party structure notice. The plaintiff appealed from this award to the county court. The deputy county court judge held that the party structure notice was bad on the ground that the work therein specified was not of such a character as could be called "making good or repairing" within s. 88. The plaintiff appealed to the Divisional Court (Phillimore and Bankes JJ.) (1), who held that dampness was capable of making a wall defective within the meaning of s. 88 and referred the matter back to the county court judge for re-trial. In the course of his judgment Bankes J. expressed the opinion that, in determining whether a party wall was defective and what steps ought to be taken to remedy the defect, regard ought to be had to the previous history of the wall. Upon the re-trial, which took place before the county

shall have the following rights in relation to party structures (that is to say):—

"(1.) A right to make good underpin or repair any party structure which is defective or out of repair.

"(11.) A right to perform any other necessary works incident to the connexion of a party struc-

ture with the premises adjoining thereto. . . ."

Sect. 90, sub-s. 3: "A building owner shall not exercise any right by this Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier."

(1) [1911] 2 K. B. 265.

court judge himself with an assessor, the judge, relying upon the opinion of Bankes J., discussed the previous history and user of the wall and said that in that respect the merits of the case were all with the defendant; and he arrived at the following conclusions. He found that the dampness which percolated into that portion of the party wall which formed the wall of the plaintiff's servants' hall made it a defective wall, but that effective work for preventing the damp in the servants' hall could be done from the plaintiff's side of the wall, and, having regard to the previous history and user of the wall, he held that no work should be permitted on the defendant's side. He therefore rescinded the surveyors' award and directed that the plaintiff, if she was not willing to erect a lining wall on the west side of her servants' hall, should be at liberty to insert from her side of the wall a vertical damp-proof course in the middle of the wall in accordance with plans submitted by Mr. Chatfield Clarke and Messrs. Cubitt, the defendant's surveyors. The plaintiff appealed to the Divisional Court (Bankes and Lush JJ.), who dismissed the appeal. The plaintiff then appealed to the Court of Appeal and asked for a new trial on the following grounds: (1.) that the county court judge misdirected himself in holding that as a matter of law he could have regard to the previous history and user of the party wall; (2.) that the works suggested by the plans of the defendant's surveyors only affected part of the party wall and did not amount to making good or repairing the same within the meaning of the Act.

The Court of Appeal held that the county court judge, who had founded his decision upon the opinion expressed by Bankes J. upon the first appeal to the Divisional Court, had gone wrong in taking into consideration the past history of the wall, and they ordered a new trial on that ground.

1913. June 10, 12. *Sir R. Finlay, K.C.* (with him *Buckmaster, K.C.*, and *E. Church Bliss*), for the appellant. The county court judge has completely disposed of this matter. In determining which of two remedies is appropriate for making good a defective party wall the past history of the wall is an element to be taken into account. But, however that may be,

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H. L. (E.) the building owner must not exercise his rights in such a manner  
 1913 as to cause unnecessary inconvenience to the adjoining owner :  
 BARRY London Building Act, 1894, s. 90, sub-s. 3.

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*Upjohn, K.C., and Cecil Walsh*, for the respondent. The decision of the county court judge is open to objection on two grounds: (1.) that he improperly took into consideration the past history of the wall; (2.) that the remedy which he approved was not a making good of the wall within the meaning of the Act. If either point succeeds this case must go back for a new trial. The appellant's argument has not dealt with the second point. The Court of Appeal rightly decided that the past history of the party wall was not a relevant consideration in determining the appropriate remedy. For that purpose it was not legitimate to consider who built on the wall or for whose convenience the building was put up. This view is supported by s. 95, sub-s. 1 (a), of the Act, which provides that in determining how the expense of making good the party structure shall be borne regard shall be had to the use which each owner "makes or may make" of the structure. The county court judge misdirected himself in a matter which had a substantial bearing upon the way in which he looked at the case, and a new trial should be ordered on that ground. But, putting aside that point, the relief given by the county court judge does not cure the defect in the party wall, but only one result arising from that defect, namely, the damp in the respondent's servants' hall. That is a departure from the statute. The right given to the building owner is to make good the party structure which is defective or out of repair. The county court judge finds that this wall is defective by reason of damp, but does not permit the respondent to do the work necessary to cure that defect. The defect would be cured by putting a lining to the wall on the appellant's side, but it will not be cured by putting a lining to the wall inside the servants' hall. Nor will it be cured by the alternative remedy proposed by the county court judge, namely, inserting a damp course in the middle of the wall, because even then the wall will be half damp and half dry, and the effect of that remedy will be to make this wall not a party wall, but two walls. The point as to "unnecessary inconvenience" does not arise because the finding of the

tribunal was not in accordance with the respondent's statutory right. H. L. (E.)

*Buckmaster, K.C.*, in reply. Dampness is not per se a defect in a party wall, but only the liability of the dampness to percolate into a dwelling-house; and this is in accordance with the finding of the county court judge. Therefore the defect will be cured by the remedy proposed by him.

[It was also argued on behalf of the appellant that the point that the county court judge had improperly had regard to the past history of the party wall in determining the remedy to be applied to the defect was not open to the respondent inasmuch as the point had not been taken at the re-trial, but this was disputed on behalf of the respondent, and reference was made to *Smith v. Baker & Sons* (1) and *Seymour v. Coulson*. (2)]

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The House took time for consideration.

July 24. EARL OF HALSBURY. My Lords, I have had the pleasure of reading the judgment of my noble and learned friend Lord Parker, and I concur with what he has said.

LORD PARKER OF WADDINGTON. My Lords, I am asked to say that my noble and learned friends Lord Loreburn and Lord Atkinson concur in the judgment I am about to read.

The 88th section of the London Building Act, 1894, confers on a building owner the right, subject to the provisions of the Act, to make good, underpin, or repair any party structure which is defective or out of repair. In considering whether a party structure is defective, the proper course is, in my opinion, to consider how far it is effective for the purpose for which it is used, or intended to be used, and not to compare its various characteristics with those of an imaginary structure perfect for all purposes. The right conferred on the building owner by the 88th section is, I think, confined to making good the party structure so that it becomes effective in those respects in

(1) [1891] A. C. 325.

(2) (1880) 5 Q. B. D. 359.

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which it is defective for the purposes for which it is actually used or intended to be used.

Having made up his mind that the party structure is defective in the sense above referred to, the building owner serves the notice required by s. 90 of the Act, stating the nature and particulars of the work he proposes to do, and in the event of the adjoining owner dissenting from what is proposed, the question is referred under the 91st section to the tribunal thereby constituted, which determines the right to do, and the time or manner of doing, any work, and any other matter arising out of the difference. For this purpose the tribunal must obviously determine whether there be a defect such as alleged, and what is the proper way to make good the party structure qua such defect. Inasmuch as a building owner is not entitled to exercise any right given him by the Act in such manner as to cause unnecessary inconvenience to the adjoining owner, the tribunal must, in determining the proper way of making good the defect, if there be one, have due regard to the convenience of the adjoining owner.

The tribunal has also to determine in what proportions the cost of making good the party structure shall be borne by the building owner and the adjoining owner respectively, due regard being had to the use that each owner makes, or may make, of the structure, and, finally, the tribunal has a discretion as to the costs of the reference.

These being the functions of the tribunal constituted by the Act, it is, in my opinion, extremely difficult to see how the past history of the party structure is in any way relevant to any question which the tribunal has to decide. Certainly such past history cannot be invoked for the purpose of shewing that one or other of the parties is to blame for any defect which, in fact, exists. If the past history of the party structure has any relevance at all, it can only be because it may throw some light on the nature of the defect or the proper mode of remedying it. In this respect I entirely concur with the judgments of the Court of Appeal.

From the award of the tribunal constituted by the Act an appeal lies to the county court, which has power to rescind or

modify the award, and to settle the time and manner of executing any work or of doing any other thing. All that has been said with regard to the relevancy of the past history of the party structure applies with the like force to the proceedings on appeal before the county court.

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The order of the county court is final, except that under s. 120 of the County Courts Act, 1888, there is an appeal to the High Court from the determination or direction of the judge on a point of law or equity or upon the admission or rejection of any evidence.

The course of this litigation has been singularly unfortunate. It commenced with a party structure notice, given by the respondent to the appellant on June 2, 1910. The party structure in question was the wall between No. 15 and No. 14, Chelsea Embankment. The respondent proposed to execute various works in connection with this wall, which was permeated with damp. The matter came before the tribunal constituted by the Act of 1894, and this tribunal on August 18, 1910, awarded that the party wall was not so defective or out of repair as to necessitate any work being executed under a party structure notice. In other words, it held that the respondent, the building owner, had no right to do the work she proposed to do. There was an appeal to the county court, which was dismissed on November 21, 1910. There was a further appeal to the Divisional Court (Phillimore and Bankes JJ.), which on March 22, 1911, allowed the appeal and remitted the matter to the county court. In delivering judgment Bankes J. expressed the opinion that it was open to the tribunal constituted by the Act to say that, having regard to the previous history and user of the wall, no work should be permitted on the adjoining owner's side of the wall, if effective, though perhaps less effective, work could be done on the building owner's side. This expression of opinion was a mere dictum, and no part of the decision of the Court. It had reference to a contention raised in argument that the wall having originally been a perfectly effective garden wall, and the defect complained of being due entirely to the action of the respondent's predecessor in title, who had utilized it as the wall of some additional buildings, no works should be allowed



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1913 opinion erroneous.

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The matter came once more before the county court on July 18, 1911. Upon this occasion each party was allowed without objection to call evidence to prove that the existing state of affairs was due to the conduct of the other party, or such other party's predecessor in title. The county court judge found, as a fact, that a portion of the wall was defective because it permitted damp to percolate from the appellant's garden into the respondent's servants' hall, but that this damp did not spread upwards. The latter part of this finding had reference to the respondent's contention upon the evidence that there was damp in the wall above the level of the appellant's garden, which affected or might affect the floor joists of the room above. The respondent's contention in this respect is negatived by the finding. The county court judge then referred to the various remedies which had been suggested. First, there was the respondent's suggestion of a vertical damp course some two inches thick on the appellant's side of the wall. Secondly, there was the appellant's suggestion of a similar damp course or lining wall on the respondent's side of the wall. Thirdly, there was the suggestion of a vertical damp-proof course of asphalt to be inserted in the middle of the wall. The judge found, as to the first suggestion, that it would cause the appellant great inconvenience, not only because the work would have to be carried out from his side of the wall, but because it would endanger his creeper. He held that the onus of justifying such inconvenience rested with the respondent. In this I think he was right. He also refers to the question whether the Act authorizes the permanent appropriation of two inches of the appellant's land for any such purpose. With regard to the second suggestion, he finds that the damp course suggested would be perfectly effective, though it would necessitate the permanent appropriation of some inches of the respondent's land. With regard to the third suggestion, he finds that it, too, would be perfectly effective, and could be carried out without entering on the appellant's land. His decision is in favour of the third suggestion, and in arriving at this decision he appears to have been influenced, not only by

the inconvenience which would be caused to the appellant by adopting the first suggestion and his doubts as to whether the Act enabled him to adopt either the first or second suggestion, but also by the past history of the wall, and particularly by the fact that the wall would still have been a perfectly effective wall if the respondent's predecessor in title had not utilized it for a purpose for which it was not originally designed, and he quoted Bankes J.'s dictum as a justification for taking this latter fact into consideration. He accordingly awarded that if the respondent were not willing to adopt the second suggestion, she should be at liberty to insert a vertical damp course in the party wall of two layers of asphalt three-quarters of an inch thick, in accordance with certain plans and specifications which had been put in at the hearing, but so that no work should be permitted on the appellant's side of the wall.

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From this award the respondent appealed to the Divisional Court substantially on the following grounds, namely, (1.) that the judge was wrong in holding that he could have regard, and in having regard, to the previous history and user of the party wall, and (2.) that the work directed by the county court judge did not amount to repairing and making good the wall within the meaning of the Act of 1894.

The Divisional Court (consisting of Bankes and Lush JJ.) dismissed the appeal, both judges holding that the original dictum of Bankes J. correctly stated the law. I think that their decision was in this respect erroneous.

The respondent appealed to the Court of Appeal on the same grounds as those on which she had based her appeal to the Divisional Court. With regard to the first ground of appeal, the Lords Justices, having rejected the contention of the appellant that this ground was not open to the respondent, decided, and I think rightly decided, that the county court judge ought not to have had regard to the previous history and user of the wall, and accordingly remitted the matter once again to the county court.

There is, I think, considerable doubt whether, having regard to the case of *Smith v. Baker & Sons* (1) and to what took place

(1) [1891] A. C. 325.

H. L. (E.) before the county court judge, the first ground of appeal was  
 1913 really open to the respondent at all, but it is, in my opinion,  
 BARRY unnecessary to decide the point, for reasons which will presently  
 v. appear.

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The Court of Appeal did not deal with the second ground of appeal. In support thereof, it was contended before your Lordships' House that the real defect in the wall is its dampness, and that the vertical damp course directed to be inserted in the centre of the wall will at most prevent this dampness on the respondent's side, and therefore only partially remedy the defect. In my opinion, dampness in a wall is not a defect within the meaning of the Act unless its existence renders the wall less effective for the purposes for which it is used or intended to be used. If a wall between two gardens is damp, it is not on that account defective, for its dampness is immaterial. Suppose that the vertical damp course contemplated by the county court judge had been already inserted, and had proved effectual for all the purposes for which the respondent uses or proposes to use the wall, would it be open to her to serve a party structure notice, on the ground that the wall was damp on the appellant's side? I think not. Such dampness would be wholly immaterial to her and wholly immaterial to him, as long as he used the wall only as a division wall between the respondent's property and his own garden. There would be no defect in any sense unless some comparison were instituted between the existing wall and some imaginary wall perfect for all purposes. There is no reason to suppose that the stability of a wall is imperilled by damp. Were this so the usual method of constructing the walls of a house with either a hollow or a damp course in the centre would be wrong. The county court judge has found that the only defect in the wall is that part of it allows damp to percolate into the respondent's premises, and that this defect will be effectively remedied by the work he directed. This finding as a finding of fact is conclusive between the parties, and I do not think that it involves any error of law. The second ground of appeal fails.

Under these circumstances it is clear that the only ground for directing a new trial is that the county court judge misdirected

himself, and having regard to the 122nd section of the County Courts Act, 1888, I do not think this is a sufficient ground, if the Court is in a position, after considering the evidence, to do complete justice between the parties. After carefully perusing the evidence before the county court so far as it was admissible, it seems to me that the ultimate decision was right, however it may have been arrived at. I am not satisfied that it was, on the true construction of the Act, open to the county court, at any rate under the particular circumstances of this case, to make any award which would involve the permanent appropriation of any land either of the appellant or the respondent. I am satisfied that it was not open to him to direct any works which would entail great inconvenience to the appellant, if it were possible to direct other works which, while equally effective and not involving any considerable extra cost so far as the respondent was concerned, would be accompanied by no such inconvenience. The county court judge adopted, and I think rightly adopted, the only other alternative open to him on the evidence by directing the works mentioned in his award, which works he finds, as a fact, will be perfectly effective, and can be carried out without entry on the appellant's land.

Under these circumstances I think the proper order for your Lordships to make is to vary the order of the Court of Appeal in the following respects, that is to say, (1.) by striking out the clause remitting the matter to the county court and all that follows ; (2.) by directing that the respondent be at liberty to insert at her own expense a vertical damp course in the party wall of two layers of asphalt three-quarters of an inch thick, in accordance with the plans and specifications prepared by Mr. Chatfield Clarke and Messrs. Cubitt, but in executing the work is to have regard to s. 90, sub-s. 3, of the London Building Act, 1894, and accordingly is to execute the work without entering on the appellant's land ; (3.) by directing that each party is to bear his or her costs of the proceedings in the county court ; and (4.) by directing that the appellant's costs in the Divisional Court and Court of Appeal are to be taxed and paid by the respondent.

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H. L. (E.)    The appellant is also, in my opinion, entitled to the costs of  
1913    this appeal.

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*Order of the Court of Appeal varied by striking out the clause remitting the matter to the county court judge to be further dealt with by him and the directions as to costs, and by directing that the respondent be at liberty to insert, at her own expense, a vertical damp course in the party wall of two layers of asphalt three-quarters of an inch thick, in accordance with the plans and specifications prepared by Mr. Chatfield Clarke and Messrs. Cubitt, but in executing the work is to have regard to s. 90, sub-s. 3, of the London Building Act, 1894, and accordingly is to execute the work without entering on the appellant's land; and, subject to the said variation, order of the Court of Appeal affirmed. Each party to bear their own costs of the proceedings in the county court; the respondent to pay the costs in the King's Bench Division and in the Court of Appeal and of the appeal to this House.*

*Lords' Journals, July 24, 1913.*

Solicitors for appellant: *Hopgood & Dowsons.*

Solicitors for respondent: *Reid, Sharman & White.*

## [HOUSE OF LORDS.]

|                               |                |                 |
|-------------------------------|----------------|-----------------|
| HARPUR . . . . .              | APPELLANT ;    | H. L. (E.)*     |
| AND                           |                | 1913            |
| THE MAYOR, ALDERMEN, AND BUR- | } RESPONDENTS. | <u>July 29.</u> |
| GESSES OF SWANSEA . . . . .   |                |                 |

*Waterworks—Breaking up Streets—Laying Water Pipes therein—Subsequent Subsidence of Street—Cost of Repair—Compensation—Claim exceeding 50l. —Jurisdiction of Justices— Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 6, 28, 85.*

By s. 6 of the Waterworks Clauses Act, 1847, where the undertakers are by the special Act empowered to take or use any lands or streams otherwise than by consent, they shall make to the owners and occupiers of and all other parties interested in any lauds or streams injuriously affected by the construction or maintenance of the works authorized by the special Act, or otherwise by the execution of the powers thereby conferred, full compensation for all damage sustained by reason of the exercise as to such lands or streams of the powers vested in the undertakers by that Act or the special Act or any Act incorporated therewith, the amount of compensation being determined under the provisions of the Lands Clauses Consolidation Act, 1845, which provided (s. 22) that claims for compensation not exceeding 50l. should be settled by justices and (s. 68) that claims exceeding that amount should be settled by arbitration or by a jury.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, “doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.” By s. 85, with respect to the recovery of damages not specifically provided for, the clauses of the Railways Clauses Consolidation Act, 1845, relating thereto were incorporated with that and the special Act; and by s. 140 of the Railways Clauses Consolidation Act, 1845, such damages were to be determined by two justices.

Undertakers for the supply of water to a borough under a special Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under their statutory powers, broke up the soil of a public road, which was repairable by a county council,

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\* *Present*: EARL OF HALSBURY (during the argument only), EARL LOREBURN, LORD SHAW OF DUNFERMLINE, and LORD PARKER OF WADDINGTON.

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and laid a pipe therein, and they restored the road to its former condition. Eight months after the completion of the work a portion of the road slipped and was repaired at a cost exceeding 50*l*. Upon a claim preferred by the county council before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage, the justices found (1.) that the whole of the work of laying the pipe had been done in a proper, efficient, and workmanlike manner; (2.) that the damage was the result of laying the pipe in the road:—

*Held*, that the claim for compensation fell within s. 6 of the Waterworks Clauses Act, 1847, and that, as it exceeded 50*l*., the justices had no jurisdiction to entertain it; by Earl Loreburn and Lord Parker of Waddington, because s. 6 applied, whether the claim fell within s. 28 or not; by Lord Shaw of Dunfermline, because the findings of the justices did not bring the claim within s. 28.

Order of the Court of Appeal [1912] 3 K. B. 493, affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of a Divisional Court upon a case stated by justices of the peace for the petty sessional division of Ystradgynlais in the county of Brecon. (2)

A complaint was preferred by the appellant, the surveyor to the Brecon County Council, against the respondents under s. 28 of the Waterworks Clauses Act, 1847, which was incorporated with the Swansea Corporation Water Act, 1905 (5 Edw. 7, c. xciv.) (3), for that on December 16, 1910, the respondents, being persons authorized by statute, to wit, the Swansea Corporation Water Act, 1905, to open and break up the soil of a certain road situate in the parish of Ystradgynlais, doing as little damage as might be and making compensation for any damage done in the execution of the powers by the said statute conferred, did so damage the road as to cause a portion thereof to give way and fall into

(1) [1912] 3 K. B. 493.

(2) [1912] 2 K. B. 16.

(3) The Swansea Corporation Water Act, 1905, by s. 2, incorporated the Waterworks Clauses Act, 1847, and the Lands Clauses Consolidation Act, 1845, subject to certain exceptions not material to the present case; and by s. 12, sub-s. 1, "The provisions of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets shall apply with the necessary modifications to the

construction laying down erection and maintenance in any streets or roads of the aqueducts authorised by this Act . . . which the corporation may and which they are hereby authorised to erect or lay down for the purposes of their water undertaking." [The material sections of the Waterworks Clauses Act, 1847, are fully set out in a note at the end of the report of the case in the Court of Appeal.]

the river adjoining thereto, and that the said road was vested in the Breconshire County Council, who were responsible for its maintenance and were entitled to be paid compensation in respect of the said damage, pursuant to the provisions of the said statute and of the Waterworks Clauses Act, 1847, therewith incorporated. The sum claimed in the particulars of claim was 87l. 10s. for building a retaining wall and other works in making good the damage caused by the slipping of the road.

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At the hearing of the complaint it was proved or admitted :

(1.) That the respondents under the Swansea Corporation Water Act, 1905, laid a water pipe twenty-four inches in diameter in a certain highway near Ystradgynlais, in the county of Brecon, which was in the district of and repairable and maintainable by the Brecon County Council, to carry water from the respondents' reservoir at Cray, in the said county, to Morriston, in the county borough of Swansea, for the purposes of their water undertaking. (2.) That on December 16, 1910, more than eight months after the laying of the water pipe was completed, a portion of the highway and the river bank supporting it to the extent of fifty feet slipped into the river. (3.) That the work of cutting the trench and of laying the water pipe therein was carried out in accordance with deposited parliamentary plans in a proper, efficient, and workmanlike manner after notice served upon the appellant, who made no objection to the position of the water pipe in the highway, and the statutory powers in connection with such work were properly and duly complied with. That after the water pipe had been laid in the trench the same was filled, rammed, or punned and the road was restored to its original condition. That the trench was opened, the water pipe laid, and the road reinstated in the presence and under the superintendence of the appellant, his officers or servants.

It was contended on behalf of the appellant that the damage done to the road was due to the laying by the respondents of a line of pipes in the highway, as stated in the facts proved or admitted, under the powers contained in the Swansea Corporation Water Act, 1905, and that the appellant was entitled to be paid compensation for the damage done under s. 28 of the Waterworks Clauses Act, 1847.



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It was contended on behalf of the respondents that the damage aforesaid, even if caused by the result of the respondents' operations (which was not admitted), was not within s. 28 of the Waterworks Clauses Act, 1847, that even if compensation was payable under that section (which was not admitted), s. 85 of that Act, which dealt with "damages not specially provided for," did not empower the recovery of "compensation," and that that section incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, did not give the justices jurisdiction to hear the complaint.

The justices were of opinion that the damage to the portion of the highway and the river bank "was the result of the" respondents "laying the said water pipe in the said portion of the said highway as aforesaid." They were further of opinion that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, and that they had jurisdiction to deal with the claim under the sections of the statutes above referred to. They therefore ordered the respondents to pay to the appellant the cost of the repair of the said highway, 87*l.* 10*s.*, and his taxed costs. The questions stated for the opinion of the Court were whether the damage, even if caused by the respondents' operations, was within s. 28 of the Waterworks Clauses Act, 1847, and if within that section, whether s. 85 of that Act, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, applied and gave jurisdiction to the justices to deal with the complaint.

The Divisional Court (Pickford and Avory JJ.) affirmed the order of the justices.

The Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.) reversed the order of the Divisional Court and held that the justices had no jurisdiction to hear the complaint.

1913. July 2, 3. *Sankey, K.C.*, and *St. John Francis Williams*, for the appellant. (1.) The damage complained of is damage done by the respondents in the execution of the powers conferred on them by s. 28 of the Waterworks Clauses Act, 1847, and this is so found by the justices.

(2.) The justices had jurisdiction to hear the complaint. The Waterworks Clauses Act, 1847, is divided into a number of bundles of sections, and special tribunals are provided for dealing with the

matters referred to in the several bundles. But the bundle of sections relating to the breaking up of streets for the purpose of laying pipes therein contains no specific remedy for damage occurring in the execution of the powers conferred by those sections. Sect. 28, which is the first section of that bundle, empowers the undertakers to break up streets and lay down pipes, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers"; but it does not say how the damages are to be ascertained or recovered. Sect. 85, which deals with "the recovery of damages not specially provided for," therefore applies. That section incorporates s. 140 of the Railways Clauses Consolidation Act, 1845, which provides that "in all cases where any damages, costs or expenses, are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount, or enforcing the payment thereof, is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices." The "compensation" referred to in s. 28 of the Waterworks Clauses Act, 1847, is "damages not specially provided for" within s. 85 of that Act, and therefore this matter was within the jurisdiction of the justices.

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*Macmorran, K.C.*, and *S. Fleming*, for the respondents. The compensation sought to be recovered in this case falls within s. 6 of the Waterworks Clauses Act, 1847, which relates to compensation in respect of lands injuriously affected "by the construction or maintenance of the works" authorized by the special Act, or otherwise by the execution of the powers thereby conferred, and provides that the amount of the compensation shall be determined, and payment enforced, in accordance with the provisions of the Lands Clauses Consolidation Act, 1845. By s. 22 of the latter Act the jurisdiction of the justices in determining such compensation is limited to claims not exceeding 50*l.*, and by s. 68 claims exceeding that amount are to be settled either by arbitration or by the verdict of a jury, whereas under s. 85 of the Waterworks Clauses Act the jurisdiction of the justices is unlimited. The language of s. 6 is wide enough to cover this

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case, and the section applies whether this is compensation under s. 28 or not; therefore this is not a claim for damages not specially provided for within s. 85 and the justices have no jurisdiction to hear the complaint. Further, the damage complained of was not damage done by the respondents in the execution of their powers under s. 28. The Court of Appeal have rightly interpreted the findings of the justices as meaning that the works were properly executed but that the injury was due to the presence of pipes under the road. There is no finding by the justices in the terms of s. 28. That section was intended to apply simply to the physical act of breaking up the streets. This damage, though in one sense it may be said to be the result of the execution of the powers conferred by that section, was not done in the execution of those powers; it was subsequent to and independent of the breaking up of the street. [Upon this point they referred to *Reg. v. East and West India Docks and Birmingham Junction Ry. Co.* (1) and *Hornby v. Liverpool United Gas Light Co.* (2)] Other statutes which deal with the breaking up of streets, such as the Gasworks Clauses Acts and the Electric Lighting Acts, contain a special nuisance section, but there is no such section in the Waterworks Clauses Act; and, in the absence of the nuisance section, when once the water company has without negligence laid its water pipes and reinstated the street, the mere presence of the pipes in the street does not, in the event of damage occurring, impose any liability on the company. Thus it has been held that in the absence of negligence no action will lie against a water company for damages in respect of the bursting of a water main: *Green v. Chelsea Waterworks Co.* (3) "Compensation," which is the word used in s. 28, is distinct from damages. Damages are recoverable for a wrongful act, but where a statute authorizes the doing of acts which would otherwise be wrongful, it takes away the right to damages and substitutes a right to compensation. The compensation recoverable under s. 28 is distinct from the damages referred to in s. 140 of the Railways Clauses Consolidation Act, 1845, as is shewn by s. 142 of that Act, where the word "compensation" is used. Sect. 85

(1) (1853) 2 E. &amp; B. 466.

(2) (1883) 47 J. P. 231.

(3) (1894) 70 L. T. 547.

of the Waterworks Clauses Act was intended to refer to the damages which would occur under ss. 67 and 74 and was not intended to refer to the compensation provided by s. 28.

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*Sankey, K.C.*, in reply. As regards s. 6, both the Divisional Court and the Court of Appeal have decided in the appellant's favour that it does not apply. That is one of a bundle of sections (6—15) headed "Construction of Waterworks" and has nothing to do with the breaking up of streets. That is followed by a bundle headed "Accommodation Works (ss. 16 and 17), and that again by a bundle headed "Mines" (ss. 18—27). All those sections deal exclusively with private rights. Sect. 28 is the first section which deals with public rights such as the rights over a highway. It is the only section which gives any authority to the undertakers to break up the highway. The county council are not persons interested within s. 6 because their only interest in the street is as a public body for the purposes of the street.

The House took time for consideration.

July 29. LORD SHAW OF DUNFERMLINE. My Lords, from the facts taken from the case signed by the justices of the peace, it appears that, under the Swansea Corporation Water Act, 1905, the respondents laid a water pipe of twenty-four inches in diameter in a main road in the county of Brecon to carry water from their reservoir at Cray to Swansea for the purpose of the respondents' water undertaking. This occurred in April, 1910. In the following December, "more than eight months after the laying of the said water pipe was completed, a portion of the said highway and the river bank supporting it, to the extent of a distance of fifty feet, slipped into the river."

Upon these facts, and in view of the arguments submitted to your Lordships' House, it would have been desirable to ascertain definitely whether this damage, occurring after this lapse of time, was causally attributable to the operation of executing the work. Unfortunately, the findings in the case do not make that clear. It is, however, found, as a matter of fact, that the work of cutting the trench and of laying the pipe was carried out "in a proper, efficient, and workmanlike manner," after notice duly served, and without objection by the appellant to the position of the



H. L. (E.) pipe. And it is also found that the statutory powers were properly acted upon and that the road was restored to its usual condition—the opening of the trench, the laying of the pipe, and the restoration of the road having been all done under the superintendence of the appellant. So far, the slipping of the highway and river bank does not appear to have been connected with the operations; and this as a finding of fact on the part of the justices would seem to negative the proposition that the damage was caused in the execution of the works.

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But in a later article of the case the justices proceed to make, not a finding, but a statement of their opinion, as follows: “We, the said justices, were of the opinion that the damage to the portion of the said highway and of the said river bank was the result of the appellants” (the present respondents) “laying the said water pipe in the said portion of the said highway as aforesaid.”

My Lords, after full consideration, I have come to be of the opinion that the judgment of the learned judges of the Court of Appeal is correct. I think that the finding of fact, and the later finding, whether of fact or of opinion, do substantially amount to this, that the slipping of the road and bank was not causally connected with the actual execution of the works in the sense of s. 28 of the Act, but was truly the result of the pipe, quite properly put in, being where it was. The importance of this distinction, my Lords, will be seen in a moment, because the statute which is invoked by both parties makes a broad distinction between damages caused by the execution of a work of this kind and damage occurring by reason of the exercise of the statutory power.

The information was laid before the petty sessions division in the county of Brecon, and the justices' Court was selected because what had occurred was said to fall within the scope of s. 85 of the Waterworks Clauses Act, 1847. It may be mentioned that the Swansea Corporation Act of 1905 incorporated the Waterworks Clauses Act with certain immaterial exceptions. The words founded on are these: “If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for,

and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act." By the Act so incorporated, namely, the Railways Clauses Consolidation Act, 1845, s. 140, it was provided that "in all cases where any damages, costs, or expenses, are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices."

It will be observed, therefore, that in both statutes the reference is made to damages "not specially provided for," or "not provided for." My Lords, in these statutes great varieties of penalties, damages, &c., are referred to, and many provisions in respect to damage, loss, or the like, occur. And reference is made, at each stage when the particular item of this category is being dealt with, to the Court or tribunal which is to determine the rights of parties. But it has to be particularly borne in mind that the Waterworks Clauses Act itself gives instances of cases which are "not specially provided for," and that by the use of these very terms. Two of these may be mentioned, namely, s. 67 and s. 74.

Under s. 67 it is provided that the amount of the expenses of the examination to ascertain whether the water supply had been fouled by gas and of the repair of injury done to the undertakings should be "ascertained and recovered in the same manner as damages for the ascertaining and recovering whereof no special provision is made are directed to be ascertained and recovered."

Sect. 74 deals with the case of neglect to pay rates and of the water having been in consequence cut off, and it provides that the rate, if less than 20*l.*, together with certain costs and expenses, should be recovered "in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act."

These instances shew that the expression used in s. 85 of the Waterworks Clauses Act as to damages "not specially provided for," all of which are remitted by s. 140 of the Railways Clauses Act to two justices, appears to relate to things more or less incidental to the administration of the Act, which the statute itself

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H. L. (E.) when dealing with them denominates as not specially provided for.  
 1913 I should myself think it doubtful whether that expression, quite  
 HARPUR apart from any distinction between the words "damages" and  
 v. "damage," would extend to the compensation which is provided  
 SWANSEA for under s. 28 being "compensation for any damage which may  
 CORPORA- be done in the execution of " the powers of opening and break-  
 TION. ing up the soil and pavement of streets and bridges or sewers,  
 drains and tunnels, and the operations of laying down pipes, and  
 doing "all other acts which the undertakers shall from time to  
 time deem necessary for supplying water to the inhabitants." The  
 section does not say that the compensation for such damage done  
 in the execution of such powers is to be dealt with as a case of  
 damages not specially provided for, and in my opinion it is not  
 necessary in this case to settle whether such compensation has or  
 has not been so treated by the statute. For I think, after much  
 consideration, that the case has not been in fact brought up to  
 a case falling within s. 28, which applies to damage done in the  
 execution of the powers of that section.

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I think, my Lords, that what has been found in fact here brings the case within s. 6 of the statute. Omitting the words which are not applicable to the case in hand, that section provides as follows: "Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to . . . use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall . . . make to the owners and occupiers of and all other parties interested in any lands . . . used for the purpose of the special Act or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for . . . all damage sustained by such owners, occupiers, and other persons by reason of the exercise . . . of the powers vested in the undertakers." In my opinion the appellants were parties interested in the road which has been used and injuriously affected by the maintenance of the works authorized by the statute, namely, the location of the pipe, and this section accordingly applies to the case; and it follows from the remainder of it that the "amount of such compensation shall be determined

in the manner provided by the Lands Clauses Consolidation Acts." This being so, it follows that the case is not one of damages not specially provided for, but is within the provisions of s. 6. The amount of damages is to be determined as provided for by s. 68 of the Lands Clauses Act, and the claim being for a sum in excess of 50*l.*, the assessment is to be fixed by arbitration or a jury. I desire to rest my opinion solely upon this ground.

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I humbly agree with the judgment of the Court below, and move that the appeal be disallowed with costs.

LORD PARKER OF WADDINGTON. My Lords, I am asked by Lord Loreburn to state that he concurs in the judgment I am about to read.

One of the works authorized by the Swansea Corporation Water Act, 1905, was the laying of an aqueduct in the highway vested in the county council of Breconshire. It is enacted by s. 12 of the Act that the provisions of the Waterworks Clauses Act, 1847, with regard to the breaking up of streets are to apply to the laying of this aqueduct. The respondent corporation laid the aqueduct properly and without negligence under their statutory powers, but some months later, as the result of their so doing, damage was caused to the highway, part of which slipped and had to be supported by a retaining wall.

Now the Act of 1905 incorporates (with immaterial exceptions) not only the Waterworks Clauses Act, 1847, but the Lands Clauses Consolidation Act, 1845. It has been long settled that the incorporation of this latter Act is of itself sufficient to confer a right to compensation whenever land is injuriously affected by the execution of works authorized by the special Act: see *Reg. v. St. Luke's* (1); and such compensation has to be settled, if the amount claimed does not exceed 50*l.*, by two justices under s. 22, but if the amount claimed exceeds 50*l.* by arbitration or the verdict of a sheriff's jury under s. 68.

Further the 6th section of the Waterworks Clauses Act, 1847, provides that where undertakers are by the special Act authorized to take or use any lands or streams otherwise than with the

(1) (1871) L. R. 6 Q. B. 572; L. R. 7 Q. B. 148.



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consent of the owners or occupiers, they shall be subject to the provisions and restrictions of the Lands Clauses Act, 1845, and shall make to the owners and occupiers of and all other parties interested in any lands injuriously affected by the construction or maintenance of the works authorized by the special Act or otherwise by the execution of the powers thereby conferred full compensation for all damage sustained by such owners or occupiers and other persons by reason of the exercise as to such lands or streams of the powers vested in the undertakers by that Act or the special Act or any Act incorporated therewith, the amount of compensation being determined under the provisions of the Lands Clauses Act, 1845. The words of this section seem also to be wide enough to confer a right to compensation in respect of lands injuriously affected by the laying of the aqueduct which the respondent corporation were authorized to lay in the highway without the consent of any person whomsoever.

In the present case the appellant on behalf of the county council claimed a sum exceeding 50*l.* by way of compensation for the damage to the highway resulting from the laying of the aqueduct, and, his claim being disputed by the respondent corporation, instituted proceedings to have the amount settled by two justices. This was clearly wrong, if the compensation claimed were compensation in respect of land injuriously affected by the execution of the work of laying the aqueduct. The appellant, however, contended that he was claiming compensation under s. 28 of the Waterworks Clauses Act, 1847, for damage done in the execution of the statutory powers of the respondent corporation, and that, there being no method provided for the recovery of such damage, he was entitled by virtue of the joint operation of s. 85 of the Waterworks Clauses Act, 1847, and s. 140 of the Railways Clauses Consolidation Act, 1845, to have the same determined by two justices. The respondent corporation disputed the jurisdiction of the justices and requested them to state a case. They accordingly stated a case in which they found as a fact, not that the damage had been done in the execution of the statutory powers of the respondent corporation,—a finding which would have sufficed to bring the case within the 28th section—but that the damage was the result of the

respondent corporation laying the aqueduct,—a finding which is somewhat ambiguous so far as s. 28 is concerned, but which makes it clear that the damage was the result of the execution of a work authorized by the special Act. I am of opinion that where damage to a highway results from the execution of a work authorized by the special Act, such highway is “land injuriously affected by the erection of the works” within the meaning of that expression as used in the Lands Clauses Act, 1845, and if this be so ss. 22 and 68 of that Act provide how the compensation for such damage is to be ascertained, whether the right to compensation arises under s. 28 of the Waterworks Clauses Act, 1847, or otherwise. The 85th section of the latter Act can therefore have no application, even if it can be construed to include compensation as distinguished from damages in the ordinary meaning of that word.

Under these circumstances the appeal, in my opinion, fails and should be dismissed with costs.

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*Order of the Court of Appeal affirmed and appeal  
dismissed with costs.*

*Lords' Journals, July 29, 1913.*

Solicitors for appellant: *Field, Roscoe & Co., for D. W. E. & M. F. Thomas, Brecon.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for H. Lang Coath, Swansea.*

## [HOUSE OF LORDS.]

H. L. (E.)\* LIVERPOOL AND LONDON AND GLOBE } APPELLANTS;  
 1913 INSURANCE COMPANY . . . . . }  
July 31. AND  
 BENNETT (SURVEYOR OF TAXES) . . . . . RESPONDENT.

*Revenue—Income Tax—Insurance Company—Foreign Investments—Interest not remitted Home—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, First, Fourth, and Fifth Cases—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D.*

A fire and life insurance company, which, in addition to its business done at home, carried on a fire insurance business abroad, was registered in this country under the Companies Acts and had its head office here. One of the objects stated in its memorandum of association was to invest money not immediately required in such manner as might from time to time be determined. By the laws of certain of the foreign States in which it carried on business an insurance company was required, as a condition precedent to carrying on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements the company invested certain sums in those States. It also voluntarily invested there other sums representing accumulated profits of the business. Both classes of investments yielded interest which was received by the company abroad but was not remitted to the United Kingdom. This interest was included in the balance-sheets of the company:—

*Held*, that the income of the foreign investments formed part of the profits or gains of the company's business and was properly taxed under case 1 of Sched. D of s. 100 of the Income Tax Act, 1842.

Decision of the Court of Appeal [1912] 2 K. B. 41, affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Hamilton J, upon a case stated by the Commissioners for Special Purposes of the Income Tax Acts. (2)

The question for decision was whether upon the facts stated in the case the appellant company was liable to pay income tax in respect of the interest and dividends arising from certain

\* *Present*: EARL LOREBURN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD PARKER OF WADDINGTON.

foreign and colonial investments, although such interest and dividends were not remitted to the United Kingdom, as forming part of the profits and gains of the company's business under case 1 of Sched. D in the Income Tax Act, 1842.

The case stated by the Commissioners is fully set out in the report before the Court of Appeal. The following is a short summary of the facts.

The appellant company was registered under the Companies Acts, 1862 to 1900, on July 25, 1904.

The objects of the company, as stated in clause 3 of the memorandum of association, were (among other things) to carry on every kind of insurance business, and (18.) "To invest the moneys of the company not immediately required in such manner as may from time to time be determined."

The company carried on the business of fire and life insurance. The head office of the company was at Liverpool, but in addition to its business done in the United Kingdom it also carried on, through branch establishments and agencies, business abroad. The business done by the company outside the United Kingdom was confined almost entirely to fire insurance. The company had large sums of money invested in securities out of the United Kingdom. The question raised by this appeal arose with respect to investments in the United States of America, in Canada, and in Australia. These investments fell into three categories called in the case classes A, B, and C. Class A consisted of investments made in various States of the United States of America and in Canada as deposits required by the local law as a condition of carrying on fire insurance business in the State in question or in the Dominion, as the case might be; and so long as the company carried on business therein it was unable to recover possession of any part of the sums so deposited, the same being held as a fund out of which, in case of non-payment of claims by the company, the policy-holders in the said States and Dominion could be paid. Class B consisted of investments made in the State of New York and in Canada as deposits required by the local law, not as a condition of carrying on business, but in order to enable the company to accept and retain risks beyond a certain limit. Class C consisted of investments made in the United

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States, Canada, and Australia, not by reason of any legal obligation, but for the purpose of deriving income or profit from moneys of the company. These investments consisted of accumulated profits made in past years, but not distributed among the shareholders, which the directors had invested in high class securities in order to have a fund easily realizable if required.

Generally it had not hitherto been necessary for the company to realize any part of these moneys for the immediate purpose of carrying on its insurance business, but they were available like any other property owned by the company for such purpose or for any other purpose of the company, whenever the company might think fit or necessary. From all three classes of investments interest and dividends were received by the agency or branch of the company in the State, Dominion, or country where the money was invested. None of the sums so received by way of interest or dividends were in fact remitted in forma specifica to the United Kingdom, but the whole amount was duly credited in the United Kingdom in the company's books and brought into all its accounts, where appropriate, including the profit and loss accounts. As a general rule the liabilities of the company accruing in the United States of America and the Dominion of Canada could be met out of the profits the company had there, that is to say, the dividends or interest received from the moneys invested as hereinbefore set out in classes A, B, and C, and the premiums which were paid to it. But should extraordinary circumstances arise the company could and would meet the claims made upon it by drawing upon its investments.

The company contended that the said three classes of deposits and investments stood aside from the carrying on of the business, and that the interest and dividends therefrom formed no part of the profits of the business within case 1 of Sched. D or otherwise; and that as the said interest and dividends were not remitted to the United Kingdom they were not liable to assessment to income tax under cases 4 or 5 of Sched. D or otherwise.

The Crown contended that the investment of the company's moneys as specified in classes A, B, and C was an essential part of its business without which it could not carry on the

business of insurers, and that the interest and dividends arising from investments necessarily made for the purpose of a business formed part of the profits and gains of that business.

The Commissioners were of opinion that the contention of the Crown was correct and that the interest on the investments in question should be included as receipts of the company in arriving at its liability under case 1, Sched. D.

Hamilton J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.).

1913. July, 7, 9. *Danckwerts, K.C.*, and *A. M. Latter*, for the appellants. The interest and dividends upon permanent investments of the company abroad form no part of its trading profits; they are not profits made by the company in the course of carrying on its fire insurance business, with which alone this appeal is concerned. They are therefore not taxable under case 1 of Sched. D, but are taxable, if at all, under case 4. But in order to bring these profits under case 4 they must have been remitted to the United Kingdom. Classes A and B of the investments are not available to meet current losses, but are required to form a fund which has to remain in custody, so to speak, for the protection of the policy-holders in the United States and Canada. Class C stands on a different footing and consists of voluntary investments, but this class of investment has never in fact been applied by the company to meet its trade losses.

All these investments represent assets of the company necessarily or otherwise set aside from its trading operations. The objects of the company as defined by the memorandum of association include as a separate item the investment of the moneys of the company not immediately required for its business. That enables the company to hold these investments as a separate enterprise. If an individual carried on, say, a boot trade and a milk trade and had also private investments, the dividends of the latter would form no part of either of his trades. It is admitted that in the case of an individual these investments would not be taxable, but it has been held in the Courts below

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that a company is incapable of making investments outside its trade. That is an erroneous proposition. There is no provision in the Companies Acts which prevents a company being formed which is not a trading company or which prevents a company being partly a trading company and partly a mere investing company. The capacity of a company depends wholly upon its constitution, and if you find a company authorized to fulfil a double or treble function there is no ground for saying that one of those functions cannot be fulfilled. The object of the memorandum of association was to confer upon this company a power of investment outside its trade. In *Smiles v. Australasian Mortgage and Agency Co.* (1) Lord Shand, in discussing what profits are taxable under case 1 and case 4 respectively, says: "If a company which has a large rest fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, including securities over moveable property in the colonies, that is a case in which the charge is to be made under the fourth case." If the view of the Court of Appeal is upheld, then all the investments of any company are part of its trade profits. Upon this view *Kodak, Ltd. v. Clark* (2) must have been decided the other way. The word "adventure" in case 1 is qualified by the succeeding words "in the nature of trade," and Hamilton J. and Fletcher Moulton L.J. were wrong in saying that it stands unqualified. Buckley L.J. in *Carlisle and Silloth Golf Club v. Smith* (3) treats the qualifying words as applying to "adventure" as well as to "concern," and he says that in order to determine the question whether the club were carrying on "an adventure or concern in the nature of trade" it is not the character of the person who carries it on but the character of the concern which is carried on that has to be regarded. [They also referred to *Gresham Life Assurance Society v. Bishop* (4); *Bartholomay Brewing Co. (of Rochester) v. Wyatt* and *Nobel Dynamite Trust Co. v. Wyatt* (5); *San Paolo (Brazilian) Ry. Co. v. Carter* (6); *Colquhoun v.*

(1) (1888) 2 Tax Cases, 367, at p. 378. (3) (1913) 29 Times L. R. 508.  
 (2) [1902] 2 K. B. 450; [1903] 1 K. B. 505. (4) [1902] A. C. 287.  
 (5) [1893] 2 Q. B. 499; 3 Tax Cases, 224.  
 (6) (1896) 3 Tax Cases, 407.

*Brooks* (1); *Sulley v. Attorney-General* (2); *Lovell & Christmas, Ltd. v. Commissioner of Taxes* (3); *Norwich Union Fire Insurance Co. v. Magee* (4); *Scottish Union and National Insurance Co. v. Smiles* (5); *Northern Assurance Co. v. Russell*. (6)]

*Sir John Simon, S.-G. (Sir Rufus Isaacs, A.-G., and William Finlay with him), for the respondent.*

[EARL LOREBURN. We will hear what you have to say about the *Kodak Case* (7).]

It is true that the Crown in *Kodak, Ltd. v. Clark* (7) does not appear to have emphasized the true proposition, and, if necessary, it is submitted that that case and *Gramophone and Typewriter, Ltd. v. Stanley* (8), which followed it, were wrongly decided and ought to be overruled. This is not a case of putting aside a rest fund which is outside the business altogether, but these investments are the source from which the company pays its ordinary liabilities in the countries in question. Lord Shand's proposition in *Smiles v. Australasian Mortgage and Agency Co.* (9) is perfectly consistent with the contentions of the Crown.

*Danckwerts, K.C., replied.*

The House took time for consideration.

July 31. LORD SHAW OF DUNFERMLINE. My Lords, the appellants are an insurance company. An elaborate analysis was made before your Lordships of its memorandum and articles of association. But substantially the only relevant matters to be extracted from these documents are that the company does (1.) fire business and (2.) life business, and (3.) it invests its moneys "not immediately required."

All these things are done for the benefit of one body of shareholders. The transactions with regard to them enter the company's accounts, and the profits arising from fire and life business, and the interest arising from investments, all go into

(1) (1889) 14 App. Cas. 493.

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(2) (1860) 5 H. & N. 711.

(6) (1889) 2 Tax Cases, 571.

(3) [1908] A. C. 46.

(7) [1902] 2 K. B. 450; [1903] 1

(4) (1896) 3 Tax Cases, 457; 73

K. B. 505.

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(8) [1908] 2 K. B. 89.

(5) (1889) 16 R. 624; 2 Tax Cases,

(9) 2 Tax Cases, 367, at p. 378.

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The facts thus appear to answer, in terms, case 1 of Sched. D of the Income Tax Act. The duties under that schedule are "to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." No other schedule is put forward by the surveyor. And "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains." Prima facie, it is difficult to figure a case so plainly covered by a statute.

But it was argued that the investment of funds abroad placed this company in the position of being only liable to be taxed under the fourth case of Sched. D, which covers "the duty to be charged in respect of interest arising from securities" abroad, and that the duty was restricted accordingly to duty upon the amount of interest "received in Great Britain in the current year." My Lords, it is not necessary to decide whether that case applies or not. The assessment has been laid on, not in respect of it, but has been laid on in respect of the first case in Sched. D, which is applicable to the balance of profit of trade. The argument as to the fourth case, therefore, drops out, because it is well settled that if a sufficient warrant be found in the statute for taxation under alternative heads the alternative lies with the taxing authority. They have selected case 1. It appears to me that this selection is not only justified in law, but is founded upon the soundest and most elementary principles of business.

It was argued, or it appeared to be argued, that this company carried on separate businesses and that the matter of investments of the company's funds was separate from its business of fire and life insurance. My Lords, such companies in the transactions for the year may make little profit, and sometimes considerable loss, on one or other of their fire or life departments; but nevertheless their stability may be maintained, and often the regularity of their profit as a whole is continued, by the fact that in the general balance of profits and gains there falls on general accounting principles to be paid in as an item of credit to revenue the interest upon invested funds. The same kind of

book-keeping occurs, and properly occurs, whether these funds are invested at home or abroad. Neither in the one case nor in the other are the funds kept, nor can they be kept on sound book-keeping, out of the sum total of the profits or gains of the concern. My Lords, many cases have been referred to in the Courts below, and were referred to in the argument of the appellants. No case contravenes this plain and ordinary principle of accounting. The series of propositions in *The Northern Assurance Co.* (1) and *The Scottish Union and National Co.* (2), which were formulated as instructions to the Commissioners, cover the present case, and have never been judicially controverted as a convenient guide.

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Further, my Lords, not only was the entire business one business, but in the present instance it was so in a very special sense. Of these investments abroad there were three classes. "A" was the class where the investments were actually required as a condition of the company carrying on insurance business in the United States. This was substantially the case with class "B," which enabled the company to accept risks beyond certain limits in New York and Canada. With regard to class "C," that consisted of sums which the company in its own interest, and not by reason of any legal obligation, invested in the United States, Canada, and Australia. The Commissioners state, and the fact must be so accepted, that these sums "are available, like any other property owned by the company, for . . . any other purpose of the company whenever the company may think fit or necessary." There can be no doubt whatsoever that these sums, one and all, whether invested in colonies or countries abroad by reason of an obligation to comply with local laws, or as a matter of business to add to the stability of the company, its profit-earning, or its attractiveness to foreign and colonial insurers, were in every sense of the term a business investment, that is to say, an investment in the course of business and for the purpose of business. No accountant, auditor, or actuary could exclude the interest arising from such investments from the category of the earnings and profits of the company. If the company itself attempted to do so, it would quoad hoc sterilize

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that portion of the account, compelling the interest from investments not only to be piled up as part of accumulations of capital, but not to be accounted as profits of the business. It would be ceasing to conduct correct accounting, and by the device of treating the interest as no part of the profits of the year, it would be, so to speak, treating itself as out of business quoad these investments and as treating the interest upon them as not arising from its own trade. The whole of this argument is a mass of confusion because it is founded upon unreality, the simple fact being that this interest is part of the profits of the company. It is treated as such quite properly in its accounts, and it is divisible as such among its shareholders.

I think the case of *Last* (1) applies; but, as already remarked, in this particular instance the most elementary considerations go to shew the unity of the concern and the combination of interest with the other elements of profit or loss in making up the sum of the year's gains. It may not be conclusive that the company's books, kept upon these sound principles, shew that the interest was so treated, namely, as part of the annual profits, but, as Hamilton J. remarks, the balance-sheets are at least "of some use as shewing what, as a matter of fact, is the true and proper way of dealing with these receipts."

I am of opinion that the appeal should be dismissed with costs.

EARL LOREBURN. (2) My Lords, the facts of this case have been found by the proper authority, and are not in dispute. The Globe Insurance Company have their head office in England and do fire insurance business, which alone is here material, in the United States, Canada, and Australia. In those countries the company have made investments which are of three classes. Class A consists of investments necessarily made to comply with the law of the country, which requires certain sums to be deposited as a condition of doing fire insurance business there. Class B is in the same position, except that these investments must be made as the condition of effecting insurances of a certain amount. Class C consists of investments made voluntarily in each country in order to put the moneys of the company to a

(1) (1885) 10 App. Cas. 438.

(2) Read by Lord Parker of Waddington.

profitable use. These sums consist of accumulated profits made in past years, which the directors have invested in high-class securities in order to have a fund easily realizable if required. In all the classes the company receives the dividends upon the sums so invested, but in no case are they specifically remitted to England. They are received abroad by the branch or agency of the company.

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As a general rule the liabilities of the company accruing within the United States and Canada can be met out of the profits the company has there, that is to say, the dividends or interest received from the investments in classes A, B, and C, and the premiums earned there, but should extraordinary circumstances arise the company could and would meet the claims upon it by drawing upon its investments. Evidently the same thing applies in Australia, as the moneys were invested there in order to have a fund easily realizable if required.

In these circumstances the Commissioners determined that the investments in question were made in the carrying on of, and were part of, the company's business transactions, and that the interest on such investments should be included as receipts of the company in arriving at its liability under case 1, Sched. D.

I agree with Hamilton J. and with the Court of Appeal in holding that the Commissioners were right. We are not dealing with the fourth case or the fifth case. We are not concerned with the question whether or not the interest or dividends were received in this country, and I say nothing about decisions upon that subject, simply because I do not wish to be diverted from the matter in hand. The only question here is whether the interest and dividends before us are profits or gains of this company's trade, manufacture, adventure, or concern in the nature of trade within the meaning of the first case. I think they are, upon the facts found by the Commissioners—whatever may have been the source from which the invested moneys were originally derived, and whether the investments were compulsory or not. They are, to use Buckley L.J.'s apt expression, the "fruit derived from a fund employed and risked" in a business coming within the statutory description. And the Crown cannot be



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An argument was urged upon us on behalf of the company that it should be treated in the same way as an individual, for example a banker, whose private fortune would be available to pay his banking debts in the last resort, though the annual income from it would not be profits of his banking adventure. An infinite number of illustrations might be given of instances in which part of a trader's income is or is not profit of his trade, and it will be time enough to decide each case when it actually arises. I know of no formula which can discriminate in all circumstances what are and what are not profits of a trade. Probably that is the reason why the statute does not contain a closer definition.

In my opinion this appeal must be dismissed with costs.

LORD MERSEY. My Lords, the appellant company has its head office in England, but it carries on part of its fire insurance business in Canada and in the United States of America. In the course of carrying on this part of its business it has invested money in securities in those countries in the circumstances and for the purposes mentioned in the case stated by the Commissioners for Income Tax. The dividends from these securities have been received in Canada and in the United States respectively, and have not been remitted to this country. The question is, whether these dividends are to be taken into account when estimating the balance of profits for the purpose of an assessment to income tax under the first case of Sched. D of the Act of 1842. The first case deals with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade," and it provides that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern." It is not disputed that the appellants do carry on a trade within the meaning of the first case, nor is it disputed that the profits earned from the fire insurance business in Canada and the United States are to be taken into account when estimating the balance of profits for income tax purposes.

But it is said that the dividends from the securities in question are not part of the profits earned in carrying on the business of fire insurance at all, that they are the fruits of money set apart and kept apart from the business, and neither invested nor used in the business. In support of this contention the memorandum of association, which defines the objects for which the company is established, was relied on. These objects are stated to be to carry on the business of fire insurance, of life insurance, of accident insurance, of marine insurance, and other similar businesses, and (clause 18) "to invest the moneys of the company not immediately required in such manner as may from time to time be determined."

It is said that the dividends in question are derived from investments made under this clause (18), and that such investments form no part of the "business" of the company. In my opinion there is no foundation either in fact or in law for this contention. It is well known that in the course of carrying on an insurance business large sums of money derived from premiums collected and from other sources accumulate in the hands of the insurers, and that one of the most important parts of the profits of the business is derived from the temporary investment of these moneys. These temporary investments are also required for the formation of the reserve fund, a fund created to attract customers and to serve as a stand-by in the event of sudden claims being made upon the insurers in respect of losses. It is, according to my view, impossible to say that such investments do not form part of this company's insurance business, or that the returns flowing from them do not form part of its profits. In a commercial sense the directors of the company owe a duty to their shareholders and to their customers to make such investments, and to receive and distribute in the ordinary course of business, whether in the form of dividends, or in payment of losses, or in the formation of reserves, the moneys collected from them. I make no distinction between the three classes of investments (A, B, and C).

I agree with the judgments in the Courts below and I think this appeal should be dismissed.

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LORD PARKER OF WADDINGTON. My Lords, the appellant company, whose head office is at Liverpool, carries on the business of fire and life assurance and also the business of granting annuities. Its operations are not confined to the United Kingdom, though in the United States, Canada, and Australia it transacts fire insurance business only. It is admitted, and indeed could hardly be disputed, that all these businesses are trades, or concerns in the nature of trade, within the meaning of case 1 of Sched. D of the Income Tax Act, 1842, and that the Crown is entitled to income tax on the annual profits and gains arising therefrom, whether such profits and gains are made within the United Kingdom or abroad. The only question arising on this appeal is whether, for the purpose of computing such profits and gains, the interest and dividends on certain investments of the appellant company in the United States, Canada, and Australia ought to be taken into account. This question ought, in my opinion, to be determined on ordinary business principles, having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the appellant company.

The case stated by the Special Commissioners for the opinion of the Court divides these investments into three classes. Those contained in class A are investments in the United States and Canada of moneys required by law to be deposited as a condition precedent to carrying on in those countries the business of fire insurance. They, in fact, constitute a security to the policy-holders in case the appellant company fail to satisfy their claims. The investments contained in class B are investments in the United States and Canada of moneys required by law to be deposited as a condition precedent to undertaking in those countries fire risks beyond a certain limit. They also constitute a security to the policy-holders. The investments contained in class C are investments voluntarily made by the appellant company in the United States, Canada, and Australia out of accumulated profits in order to have a fund easily realizable if required. The interest and dividends on the investments comprised in all three classes, though received by the appellant company, are not actually transmitted to this country so as to be taxable

under case 4 of Sched. D. If they fall to be taxed at all it can only be under case 1, by being brought into account in assessing or computing the profits or gains to be taxed under that case.

With regard to the investments contained in classes A and B, it is, I think, beyond controversy that they were made for the purpose of, and are at risk in, the company's fire assurance business, and it appears to me quite clear that under these circumstances the interest and dividends arising therefrom ought, on ordinary business principles, to be brought into account in computing the profits and gains of such business.

With regard to the investments contained in class C, they have been made in order to have a fund easily realizable if required, that is (as I read it) if required for the purposes of the businesses of the appellant company. The income and dividends of these investments are, in fact, treated as receipts on account of these businesses, and dealt with accordingly, and the capital thereof is, and is intended to be, at any time available for the purposes of these businesses. The investments, in fact, constitute a reserve fund, and it is, I think, essential in all such businesses as those carried on by the appellant company that similar reserve funds of this nature should be accumulated. In my opinion it is impossible to say that such reserve funds are not assets employed in the business for the purposes of which they have been accumulated. I understood the appellant company's counsel to rely on clause 3 (18) of the memorandum of association of the appellant company. In my opinion this clause is not in favour of, but against, the appellant company's contention. It provides that moneys of the company "not immediately required" may be invested in such manner as may from time to time be determined. Obviously moneys invested under this clause are not withdrawn from the businesses of the company, but are retained for the purposes of such businesses, though temporarily invested, so as not to lie idle. I conclude that in the case of the investments comprised in class C, as well as those comprised in classes A and B, the interest and dividends ought therefore, according to ordinary business principles, to be brought into account for the purpose of ascertaining the profits and gains of the appellant company under case 1.

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*Order of the Court of Appeal affirmed and appeal
 dismissed with costs.*

Lords' Journals, July 31, 1913.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Laces
 & Co., Liverpool.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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*Trade Mark—Registration—Distinctive Mark—Initial Letters—User—Trade
 Marks Act, 1905 (5 Edw. 7, c. 15), s. 3; s. 9, sub-s. 5.*

Motor cab proprietors in London applied for registration as trade marks for motor vehicles of two marks used by them for about three years on and in connection with their motor cabs in London. One mark consisted of the letters "W" and "G" (joined by the copulative symbol "&") written in a running hand with a distorted tail to the "G" ending up under the "W." The other mark consisted of "W & G" in ordinary block letters. These marks had become in fact distinctive in the London district but not elsewhere. The registrar refused the applications :—

Held, that the marks were not distinctive within the meaning of the word in s. 9, sub-s. 5, of the Trade Marks Act, 1905, and were therefore not registrable.

Decision of the Court of Appeal [1912] 1 Ch. 644, varied.

APPEAL and cross-appeal from an order of the Court of Appeal varying an order of Eve J. (1)

* *Present*: EARL LOREBURN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD PARKER OF WADDINGTON.

The respondents were a limited company carrying on the business of motor car dealers and motor cab proprietors in Regent Street, London.

On December 2, 1910, the company applied to the Registrar of Trade Marks for registration of two trade marks in respect of motor vehicles in class 22 (Applications Nos. 328,990 and 328,991).

The mark comprised in application No. 328,990 consisted of the letters "W" and "G" connected by the copulative symbol "&" and written in cursive characters with a somewhat bold return flourish to the tail of the "G" ending up immediately below the "W."

The mark comprised in application No. 328,991 consisted of the same two letters connected by the same copulative symbol and printed in plain block capitals.

These applications came before the Comptroller-General sitting as Registrar.

It was proved by the declarations filed on behalf of the company that the company commenced business in 1908 and had since that date acquired 1300 motor cabs which were in constant use in and around London; that the letters "W & G" in the written form were placed upon all the company's cabs, being painted on the door panels, and also affixed in brass to the radiator, and were also placed upon the caps and coats of the drivers; that the letters in that form and also in other forms, including plain block capitals, were largely used in connection with the motor vehicles and the business of the company; that the company's motor vehicles were known to and distinguished by the police and the public as "W & G"; and that hotel, club, and other servants were consistently instructed to call up the company's cabs by the name "W & G."

The Comptroller-General refused both applications on the ground that the marks were not distinctive.

The company appealed. At the hearing before Eve J. it was agreed between counsel that a good deal of further evidence might be called on behalf of the company to shew that the letters "W & G" had become distinctive in the London district, but that no such evidence could be given to shew that they had become distinctive in any other part of the country.

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H. L. (E.) Eve J. affirmed the decision of the Comptroller-General as to
1913 both applications.

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The company appealed to the Court of Appeal.

The Court of Appeal, consisting of Cozens-Hardy M.R., Fletcher Moulton L.J. and Farwell L.J., as to application No. 328,990 (Farwell L.J. doubting) reversed the decision of Eve J. and ordered the Registrar to proceed with the application, and as to application No. 328,991 (Fletcher Moulton L.J. dissenting) affirmed his decision.

The registrar appealed against the decision of the Court of Appeal upon the first point, and there was a cross-appeal by the company against their decision upon the second point.

1913. July 10. *Sir Rufus Isaacs, A.-G.*, and *Sir John Simon, S.-G.* (with them *Austen-Cartmell*), for the appellant. Under s. 12, sub-s. 2, of the Trade Marks Act, 1905, the Registrar in considering an application for registration has a discretion whether to allow registration or not: *Eno v. Dunn* (1); *In re Australian Wine Importers, Ltd.* (2) This is shewn by contrasting his position under s. 12 with his position under s. 16 where the time for giving notice of opposition has expired or where there has been an opposition which has failed. His function at the earlier stage of the proceedings is to protect the rights of the public and for this purpose he must have regard not only to the present but to the future: *In re Joseph Crosfield & Sons, Ltd.* (the "Perfection" case) (3) It is not right to allow an application for registration to proceed on the ground that the matter can be dealt with on opposition, for non constat that there will be an opposition or that the opposition may not be bought off. The object of the opposition is simply to protect private rights. As regards public rights there is no further stage in the proceedings. The Registrar must determine (1.) whether a mark is capable of being distinctive, (2.) whether it is adapted to distinguish, and (3.) whether on the facts it is distinctive. The same considerations

(1) (1890) 15 App. Cas. 252, at p. 261, per Lord Herschell.

per Cotton L.J.

(2) (1889) 41 Ch. D. 278, at p. 288

(3) [1910] 1 Ch. 130, at p. 154,

per Farwell L.J.

apply to both these marks, for there is nothing distinctive in the script. As was pointed out by Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons Ltd.* (1), the test is, will the registration of the trade mark cause substantial difficulty or confusion in view of the rights of user by other traders? Applying that test there must obviously be many firms having the initials W and G who are or may be engaged in the motor trade, and once that fact is admitted it is impossible to contend that these letters are adapted to distinguish. Further, these marks are not distinctive in fact, for user of a mark in London cannot be taken as determining whether the mark is distinctive all over the country. Assuming that registration is refused, the applicants will still have their common law right to protection. The judgment of Farwell L.J. is really in the appellant's favour, and the only reason why he did not formally dissent was that he failed to appreciate that he was shutting the door upon all public considerations, and that qua the law officers his decision was final. This clearly appears from his observations in *In re R. J. Lea, Ltd.* (2) Looking at the circumstances of the particular case and at the language of the statute the Comptroller and Eve J. have taken the right view.

Sir R. Finlay, K.C., and *Kerly* (with them *A. J. Walter, K.C.*), for the respondents and cross-appellants. In refusing to accept these applications the Comptroller did not act in the exercise of any discretion, but proceeded upon an erroneous view of the law, namely, that an application to register a mark consisting of letters was per se objectionable. Further, the Registrar is not clothed with any discretion at all in the proper sense of the term, but he has to exercise his judgment, and in every case that exercise of judgment is liable to review by the Court. If the statutory conditions are fulfilled the applicant has a right to registration. See Trade Marks Act, 1905, ss. 11, 19, 20, 21. The public interest in the matter is reduced to the smallest proportions. It resolves itself into the protection of those persons who having the same initials might want to utilize them for the purpose of appropriating the reputation which the respondents have built up. Nor is it true to say that the public interest is only protected at

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(1) [1910] 1 Ch. 130, at p. 148.

(2) [1913] 1 Ch. 446, at p. 455.

H. L. (E.) this stage, because under s. 16 the Board of Trade have express
 1913 power, after the time for opposition has elapsed or after an unsuccessful
 REGISTRAR OF TRADE MARKS opposition, to direct the Registrar not to proceed with the
 W. & G. registration. As to the script nothing could be more distinctive. As
 DU CROS, LIMITED. to the letters in block type Fletcher Moulton L.J. was right in
 saying that the intention of the Act was to let in marks consisting
 of letters and combinations of letters if it appeared that such mark
 was not in use in the trade. Before the Trade Marks Act of
 1875 trade marks had become general in this country, but as the
 law then stood a trader who adopted a trade mark was subject to
 several disadvantages in obtaining the protection of the Court.
 He had to prove that the mark had become identified with his
 goods; he could acquire no right to the mark except by considerable
 user; and he had no means of ascertaining whether the same
 mark was already in use by somebody else. The Trade Marks
 Acts were designed to remedy these defects by providing for
 registration. The Act of 1905 was intended to extend the
 register, but it has been so construed as actually to narrow it.
 Letters were known as trade marks at common law before any
 registration and they could always be put upon the register as
 old marks, but they were excluded as new marks by all the Acts
 prior to the Act of 1905, which admitted them for the first time.
 By that Act the Legislature contemplated that letters and combinations
 of letters should be distinctive in themselves unless there was
 something to be said against them. No harm can result from
 allowing the registration of letters which are not yet in use in
 the trade. "Adapted to distinguish" means "which can distinguish"
 and is applied to new marks which have not been in use. If a
 mark has been used there is no difficulty in saying whether it is
 distinctive or not. These two letters are adapted to distinguish
 and are therefore distinctive and constitute a registrable trade
 mark. Further, if a mark has in fact proved to be distinctive
 wherever it has been used nothing more is required to prove
 distinctiveness, and on that ground also these marks are entitled,
 so far as the public is concerned, to registration.

Sir John Simon, S.-G., replied.

The House took time for consideration.

Aug. 1. LORD SHAW OF DUNFERMLINE. My Lords, in this case I have had the pleasure and advantage of reading the judgment about to be pronounced by my noble and learned friend Lord Parker, and with that judgment I concur.

There is, however, one point in the discussion to which I desire particularly to refer. I allude to the view taken by the Court of Appeal with regard to the position and duty of the Registrar of Trade Marks. My Lords, in my opinion, that official, when an application for registration is made, has not only an administrative but also a quasi-judicial function. I think that he has to exercise a discretion, exercising it, of course, in a judicial spirit. To use the words of Lord Herschell in *Eno's Case* (1), "while he is in certain cases prohibited from registering, a discretion whether to register or not seems in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised."

But in the next place, I think that those provisions of the statute, to which I am about to refer, shew that his action is not merely of a preliminary character (passing on the case to the stage when opponents of the registration may appear), but is of the character of a judicial pronouncement on the merits of the application itself.

The case arises in this way. Messrs. W. & G. Du Cros, who are manufacturers and users of motor cars, have made two applications for registration as trade marks of two letters of the English alphabet linked together by the conjunction "&." The one is in block letters and the other in cursive or script form. These trade marks consist of nothing else than "W & G."

My Lords, I desire to dissociate myself from the view which one of their Lordships in the Court of Appeal indicated—that the judgment of the Registrar was pronounced on the subject of the registration of letters generally. The Registrar took, in my humble opinion, the correct course in dealing with this case, as all such cases must be dealt with, namely, as depending upon its own particular facts. He made no pronouncement, as I read his judgment, with regard to the use of combinations of letters in general, but he made a pronouncement with regard to

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the one matter before him, namely, the use of "W & G." The importance of that view and of the error or mistake in regard to it is seen by this consideration which I will venture to put before the House. Suppose Messrs. W. & G. Du Cros, instead of attempting to appropriate (for that is substantially what it comes to), for their own trade purposes, the initials "W & G," had put their own full initials, namely, "W. & G. Du C.," then the whole action might have had a different complexion, and it is quite possible that the Comptroller might have come to a different conclusion. For some reason, however, which has not been fully explained, the respondents claim the right to insert in a trade mark nothing else than "W & G"; and it is manifest that "W & G" form the initial letters of numerous firms, amounting, I think, in the view of the Registrar, possibly to thousands throughout the country. Accordingly, if a trade mark were granted for "W & G" simpliciter, it would disable all those traders who contemplated entering the motor business from attaching to their own goods their own initials except under the peril of infringement. I cannot think that the statute meant to grant any such privilege under the guise of a trade mark.

My Lords, the action of the Registrar was directed properly by s. 12 of the Trade Marks Act. I call particular attention to it in order to shew that in its various sub-sections, after having provided that the application may be refused, provision is elaborately made for appeal and discussion of the conclusion to which the Registrar has come. It is under that provision that the present appeal arises. Sect. 13 goes on to provide for the case of the proceeding by the Registrar having taken the form of accepting for registration; and then follows s. 14, which provides that the public in general who consider themselves aggrieved, or any member of the public, may enter the field as *litis contestants*, and argue the matter before the Court.

I think it would be to obliterate or grievously to weaken all the provisions for appeal in s. 12 if this House were to give any sanction to the view that the action of the Registrar under s. 12 was of a merely preliminary character. No doubt a decision under s. 12 would not foreclose an ultimate decision after others have appeared to oppose, but it appears to me that the Registrar

was within his rights and performing his correct duty in looking to the particular facts of the application and in taking a wide survey of the effects of a grant, and in doing this for himself and exercising at that stage his judicial discretion.

My Lords, it is to that view of the Registrar that I now direct your Lordships' attention. He says: "It would, I think, be difficult to say that letters, as a rule, are in any way distinctive. The letters of the alphabet ought to, and should, be open to the general public for use." The Registrar is dealing with that as a general rule; he is not excluding any particular or exceptional case; and I think your Lordships are all of opinion that his judgment upon that topic is correct. But he follows on, speaking no doubt from a wide experience, and says: "Possible combinations of the letters of the alphabet are limited, and the present combination, W. and G., might, I think, be found to be in many thousands of cases the initials of traders, or used in some way in trade or manufacture. Prima facie, therefore, it would appear so far as letters are concerned that they are not per se adapted to distinguish the goods of one trader from those of another." And in a later portion of what I may venture to describe as a most admirable judgment and description of the whole situation by this official, he says: "This question should be asked in all such cases: Will the registration of the trade mark cause substantial difficulty or confusion in view of the rights of user by other traders?"

My Lords, I think that question is justified by the judgment of Lord Moulton in the *Perfection Case* (1); and, speaking for myself, I should describe the duty of the Registrar as this: that examining the particular facts, he has also to survey the possible confusions or difficulties which might arise in consequence of the grant of the trade mark, or the possible impairment of the rights of innocent traders to do that which, apart from the grant, would be their natural mode of conducting their business. What, my Lords, could be a more natural mode of conducting business than that a trader whose initials are "W. and G." should put these initials upon the goods which he vends or uses? And yet for some reason, as I say, not disclosed, it is proposed to reserve these

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initials, which may be the initials of hundreds of other traders, as the exclusive property of one person under the guise of a trade mark.

I am aware of the argument that it is open to any person to make application to have a trade mark withdrawn or amended. But, my Lords, I do not think that traders, using innocently their most appropriate modes of carrying on their business, should be put in the position of plaintiffs in any such application, and I do not think that any right which is substantially by way of monopoly should be granted to one particular trader, to use under the guise of a trade mark and for himself alone initials which may be of general use in trade.

My Lords, I have substantially nothing further to add than this, that I incline to the opinion that the determination of the Registrar, which was assented to and confirmed by Eve J. in a judgment with no word of which I differ, rather appears to have been to all intents and purposes also confirmed in the Court of Appeal on its merits. I read the judgments of the Master of the Rolls and Farwell L.J. in this sense: that they, so to speak, passed the question on its merits on, thinking that it would be properly discussed at a later stage. I feel bound to say that I largely agree with the view which is expressed by Farwell L.J. when he says with regard to the function of the Registrar: "His function is to protect the interests of the public, present and future; the motor trade is still comparatively a young industry, and it may well be that no existing trader may care to contest the matter." Then he says: "I only agree to the applicants being permitted to go on with their case as to these, and not being stopped in limine thereon." That was also the view of the Master of the Rolls.

My Lords, a distinction was made in the Court of Appeal between the two applications—a distinction between a trade mark claimed for the block letters and for those in cursive or script form. I cannot say that I see any substance in that distinction. I have looked at the script form. If the block letters are to be condemned they are to be condemned in this language of the Master of the Rolls which I am about to read: "In my opinion this is an illegitimate attempt to take exclusive possession of a part of the alphabet to the detriment of future traders who may

honestly desire to put their own initials on their own goods." My Lords, I think that that is also the case with regard to the script. There is nothing peculiar in it; it is an ordinary "W & G" with perhaps an increase of the size of the tail of the "G," and there is an end of all which would make for a distinctive mark. I think that the language of the Master of the Rolls can be appropriately used with regard to both forms. He has used it with regard to the block; I think it could be used also with regard to the script.

I move your Lordships that the order so far as appealed from be reversed, and that the order of Eve J. be restored; and that the cross-appeal be dismissed with costs.

LORD MERSEY. My Lords, I have had the advantage of reading the judgment which is about to be delivered by my noble and learned friend Lord Parker, and I agree with it.

LORD PARKER OF WADDINGTON. My Lords, I am asked to say that Lord Loreburn concurs in the judgment that I am about to read.

My Lords, the proper time for considering whether a mark is registrable, or whether, having regard to the interests of the public, it ought to be accepted or rejected, is, in my opinion, when the application for its registration first comes before the Registrar under the 12th section of the Act of 1905. If the mark be then allowed to proceed to advertisement under the 13th section, all possibility of considering whether, in the interests of the public or otherwise, it ought to be admitted to registration may have been lost, for, unless there be private opposition to the registration, the mark must, in default of the intervention of the Board of Trade, be put on the register under the 16th section. In this respect the Court of Appeal appears to have acted under an erroneous impression as to the true meaning and effect of the Act. They were, in my opinion, bound to determine the question raised before them, and could not postpone its determination until after the mark had gone to advertisement.

My Lords, in the present case there were two applications before the Registrar—one for the registration of the mark "W & G" in script and the other for the registration of the same mark printed in block type. The Court of Appeal allowed

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the former to proceed to advertisement, but rejected the latter. Your Lordships have to determine whether either mark can properly be allowed to proceed to advertisement.

I may say at once that for this purpose both marks appear to me to stand in precisely the same position, for if the written mark were on the register it is, I think, quite certain that, in default of any disclaimer, the owners of this mark would be entitled to regard the use of "W & G," printed in block type, as an infringement. If the former mark be registered there would, therefore, be no reason for rejecting the latter mark, for no one else could use it upon, or in connection with, the goods in respect of which the former mark was registered.

My Lords, if either mark be registrable, it must be because it is a distinctive mark within the meaning of s. 9, sub-s. 5, of the Act. "Distinctive" is defined as meaning "adapted to distinguish the goods of the applicant for registration from the goods of other persons." This definition is found for the first time in the Act of 1905, but the word "distinctive" was, I think, used in all the earlier Acts in the sense of "adapted to distinguish." The difficulty lies in finding the right criterion by which to determine whether a proposed mark is or is not so adapted. If, as is sometimes suggested, the mark is to be considered on the hypothesis that it will be admitted to registration, and in conjunction with the monopoly of user which such registration confers, I can imagine no mark which would not be adapted to distinguish the goods of the proprietor from those of other persons. Nothing could be better adapted for this purpose than some letter or combination of letters which no one else was at liberty to use. In my opinion, in order to determine whether a mark is distinctive it must be considered quite apart from the effects of registration. The question, therefore, is whether the mark itself, if used as a trade mark, is likely to become actually distinctive of the goods of the person so using it. The applicant for registration in effect says, "I intend to use this mark as a trade mark, i.e., for the purpose of distinguishing my goods from the goods of other persons," and the Registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant, quite apart from the effects of registration, is likely

or unlikely to attain the object he has in view. The applicant's chance of success in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods. It is apparent from the history of trade marks in this country that both the Legislature and the Courts have always shewn a natural disinclination to allow any person to obtain by registration under the Trade Marks Acts a monopoly in what others may legitimately desire to use. For example, names (unless represented in some special manner) and descriptive words have never been recognized as appropriate for use as trade marks. It is true that they became registrable for the first time under the Act of 1905, but only if distinctive, and they cannot be deemed distinctive without an order of the Board of Trade or the Court. This restriction does not apply to marks consisting of a letter or combination of letters, but before such a mark be accepted the Registrar or the Court has to be satisfied that it is adapted to distinguish the goods of the applicants from those of others. It need not necessarily be so adapted, and whether it is or is not so adapted appears to depend largely on whether other traders are or are not likely to desire in the ordinary course of their business to make use in connection with their goods of the particular letter or letters constituting the mark.

There seems no doubt that any individual or firm may legitimately desire in the ordinary course of trade to use a mark consisting of his or their own initials upon, or in connection with, his or their goods. The applicant company's cars are marked "W & G" because those are the initial letters of the christian names of the partners in the firm to whose business the applicant company has succeeded. The use of the initials of an individual or firm on the goods, packing cases, letter paper, and invoices of such individual or firm is common. Individuals whose names were William Green or Wallace Graham, or firms whose names were Weston and Gibbs or Wilcox and Gathorne, might desire to make use in this way of the letters W G or W and G, and it would be a strong thing to deprive them of the

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right to do so. It is to be observed that initials are even less adapted for trade mark purposes than names, and the latter (unless represented in a special manner) cannot be deemed distinctive without an order of the Board of Trade or the Court. Under these circumstances, I cannot think that the mark "W & G," whether in script or in block type, is in itself distinctive within the meaning of the Act.

There is nothing in the history of trade marks in this country which conflicts with the view above stated. Prior to the Trade Marks Act, 1875, which was the first Act dealing with the subject of trade marks, there existed, as, indeed, there still exist, trade marks which, though in fact owing their existence to the application of equitable principles, are sometimes described as common law trade marks, as distinguished from statutory trade marks. Independently of any trade mark legislation, whenever a person uses upon or in connection with his goods some mark which has become generally known to the trade or the public as his mark, and thus operates to distinguish his goods from the goods of other persons, he is entitled in equity to an injunction against the user of the same or any colourable imitation of the same mark in any manner calculated to deceive the trade or the public. Equity has never imposed any limitation on the kinds of mark entitled to this protection, but in every case it has to be proved that the mark has by user become in fact distinctive of the plaintiff's goods.

The scheme of the Act of 1875 was not, as it might have been, to create a register of all common law marks. On the contrary, the Act specifies certain kinds of mark (somewhat limited in number) which the Legislature considered appropriate for use as trade marks, and allowed any one, without any previous user thereof, to apply for the registration of any mark of a kind specified, making registration equivalent to user, and granting the registered proprietor a monopoly. Under this Act there could be no registration of a mark consisting of a word or words, a letter or letters, or a numeral or numerals, except that any distinctive word or words or combination of letters or numerals used as a trade mark before the passing of the Act might be registered.

The trade mark legislation of 1883 and 1888 left the law

unchanged so far as letter marks were concerned. These became registrable for the first time under the Act of 1905, but only if they were distinctive in the sense above referred to. There is, however, a proviso in s. 9 to the effect that in determining whether a mark is distinctive in this sense the tribunal may consider the extent to which actual user has rendered the mark in fact distinctive. But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable. If the tribunal finds that a mark is anywhere, or among any class of people, in fact, distinctive of the goods of the applicant, it may be influenced by this fact in determining whether it is adapted to distinguish these goods from those of other persons, but distinctiveness in fact is not conclusive, and the extent to which the tribunal will be influenced by it must, in my opinion, depend on all the circumstances, including the area within which and the period during which such distinctiveness in fact can be predicated of the mark in question.

In the present case it appears that the mark "W & G" in script is at the present moment, and in a particular area, in fact distinctive of the cars of the applicants for registration, but the area within which and the time during which such distinctiveness has existed are, in my opinion, insufficient to displace the opinion I have formed on more general grounds.

In my opinion the Attorney-General's appeal succeeds and the cross-appeal fails.

Ordered and adjudged that in the original appeal the order of the Court of Appeal so far as therein appealed from be reversed, and that in the cross-appeal the order of the Court of Appeal so far as therein appealed from be affirmed and the cross-appeal dismissed. W. & G. Du Cros, Limited, to pay the costs in the Courts below and also the costs of both the original and cross appeals to this House.

Lords' Journals, August 1, 1913.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondents: *John B. & F. Purchase.*

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Aug. 1. THE LORDS COMMISSIONERS OF THE } RESPONDENTS.
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Employer and Workman—Compensation—Contracting out—Scheme of Compensation—Re-certification—Ballot—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3, sub-s. 1; s. 15, sub-ss. 2 and 3.

A scheme of compensation under the Workmen's Compensation Act, 1906, is not bad because it purports to oust the jurisdiction of the arbitrator under the Act, and a workman who has agreed to accept the provisions of a duly certified scheme cannot resort to any of the provisions of the Act.

Horn v. Lords Commissioners of the Admiralty [1911] 1 K. B. 24, followed.

On re-certification under s. 15 of the Workmen's Compensation Act, 1906, of a scheme of compensation which has been certified under the Workmen's Compensation Act, 1897, it is not necessary that a ballot of the workmen shall be taken before the registrar can re-certify.

Decision of the Court of Appeal [1912] 2 K. B. 26, affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the county court judge of Portsmouth sitting as arbitrator under the Workmen's Compensation Act, 1906.

In May, 1908, the appellant, who was employed by the respondents as a bricklayer, sustained an injury to the third finger of his right hand by accident arising out of and in the course of his employment, and in the following year the finger was amputated and the appellant was returned as unfit for further employment. The respondents offered the appellant compensation in respect of his injury, but the appellant was not satisfied with the amount.

On January 17, 1908, the appellant had signed a contract whereby he elected to come under the provisions of a scheme of compensation for the respondents' workmen and agreed that the

* *Present*: EARL LOREBURN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD PARKER OF WADDINGTON.

provisions of the scheme should be substituted for the provisions of the Workmen's Compensation Act, 1906.

This scheme was originally certified by the Registrar of Friendly Societies under the Workmen's Compensation Act, 1897. The scheme provided for the payment of an allowance to the injured workman during the continuance of his incapacity at varying rates according as his capacity to contribute to his own support was "shown to the satisfaction of the Treasury to be" totally destroyed, materially impaired, impaired, or slightly impaired. After the passing of the Act of 1906 the scheme was modified in certain minor respects in order to conform with the provisions of that Act, and in particular a clause was inserted enabling any workman who so desired to withdraw from the scheme at any time, and it was re-certified by the Registrar of Friendly Societies.

The certificate of re-certification was in the following form :—

" No. 71C under the Act of 1897 re-certified as No. 116.

" Workmen's Compensation Act, 1906.

"It is hereby certified that the foregoing scheme (No. 71C under the Act of 1897) provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Workmen's Compensation Act, 1906.

" If not renewed this certificate is to expire on the 30th day of June, 1913.

" Dated the 16th day of December, 1907."

No ballot had been taken of the workmen to whom the scheme was applicable.

On August 8, 1910, the appellant applied for arbitration under the Workmen's Compensation Act, 1906, as to the liability of the respondents to pay compensation and as to the amount of compensation. The respondents by their answer alleged that they were liable only in accordance with the scheme and that the county court judge had no jurisdiction to hear the application.

The county court judge, following *Horn v. Lords Commissioners of the Admiralty* (1), a decision upon the same scheme, dismissed the application upon the ground that he had no

(1) [1911] 1 K. B. 24.

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H. L. (E.) jurisdiction to hear it, and his decision was affirmed by the
 1913 Court of Appeal (Cozens-Hardy M.R. and Farwell L.J. (Fletcher
 }
 GODWIN Moulton L.J. dissenting)).

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1913. July 9. *Sir Alfred Cripps, K.C.*, and *Harold Morris*,
 for the appellant. This scheme is bad, first, because it
 ousts the jurisdiction of the county court judge, and, secondly,
 because no ballot was taken of the workmen to be
 affected by the scheme. As to 1, a scheme which the
 Registrar of Friendly Societies can certify under the Act
 of 1906 cannot be a scheme which deprives the workman of
 the protection of the Act. The Legislature intended merely to
 substitute the benefits of the scheme for the scales provided by
 the Act; it was dealing with quantum only; it did not intend to
 affect the liability of the employer under the Act. This scheme
 provides a new and different method of arbitration, and under it
 the workman must rely on the judgment of the Treasury as to
 whether he is entitled to compensation or not; it is therefore
 not in accordance with the Act. *Horn v. Lords Commissioners of*
the Admiralty (1), which is opposed to this contention, was wrongly
 decided. As to 2, s. 15 provides for the termination of schemes
 under the Act of 1897 after a certain period unless they are re-
 certified and stipulates that the registrar in re-certifying shall be
 satisfied that the scheme, which may be modified so far as
 necessary, conforms with the provisions of the Act as to schemes.
 Those provisions are to be found in s. 3, which is materially
 different from the corresponding section in the Act of 1897.
 Under s. 3, sub-s. 1, of the Act of 1906, to constitute a valid
 scheme, the registrar must certify, first, that it provides scales of
 compensation not less favourable to the workmen and their
 dependants than the corresponding scales contained in the Act,
 and, secondly, that a ballot of the workmen has been taken
 shewing a majority in favour of the scheme. The essential
 alteration in the law made by that sub-section is the introduction
 of the ballot, and how can it be said that that provision is to be
 disregarded? The ballot is required for every scheme whether
 new or old, and the re-certified scheme must conform with the

(1) [1911] 1 K. B. 24.

provisions of the Act as to schemes both as to its contents and as to the conditions under which it comes into existence. Assuming that the ballot is a condition precedent it is still a provision of the Act as to schemes. The object of the Act was to bring all schemes up to the same level. Further, the ballot must be included in the certificate. Although the Act speaks of re-certifying, it was intended that the certificate should be a new certificate and that it should comply with the requirements of s. 3, sub-s. 1, which alone enables the registrar to grant a certificate; and that sub-section provides that the certificate must contain all the matters therein specified. This certificate, therefore, is bad in form.

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Sir Rufus Isaacs, A.-G., and B. A. Cohen, for the respondents.

[EARL LOREBURN intimated that the House did not desire to hear counsel for the respondents upon the first point.]

The Act does not require that a ballot shall be taken before re-certification of an old scheme. It is dealing with two different things—the certification of a new scheme under s. 3 and the re-certification of an old scheme under s. 15. It is apparent from the language of s. 15 that something which but for that section would not have been good is made good by that section. Upon the appellant's construction of the Act, sub-ss. 2 and 3 of s. 15 are unnecessary and meaningless; sub-s. 4 alone is necessary. The plan of the Legislature was this: that where there is already in existence a certified scheme which has been working for a considerable time different considerations should apply, and that the registrar, before re-certifying, should satisfy himself that the contents of the scheme are as favourable to the workmen as the scales of compensation provided by the Act. Re-certification is not the same thing as certification and does not mean that the certificate must be in the form prescribed by s. 3, sub-s. 1. Nor is it necessary that the certificate shall state that the scheme conforms with the provisions of the Act as to schemes. All that sub-s. 3 of s. 15 requires is that the registrar shall be satisfied that the scheme does so conform. No particular form of certificate is required by s. 15, and it would be sufficient for the registrar to say "I re-certify." Under s. 3, sub-s. 1, it is plain that the ballot is to be a condition precedent to the existence of

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the scheme and is not to be a part of the scheme itself, and a scheme cannot conform with something which is a condition precedent to its coming into existence. Therefore "the provisions of this Act as to schemes" in s. 15, sub-s. 3, must mean the provisions of this Act as to the contents of the scheme.

Sir Alfred Cripps, K.C., replied.

The House took time for consideration.

Aug. 1. LORD SHAW OF DUNFERMLINE. My Lords, this is an appeal from an order of the Court of Appeal of February 7, 1912, affirming a judgment of the county court judge of Hampshire. The matter in question was an arbitration having reference to the rights of a workman in the employment of the respondents, who had been injured during his employment and in the course of it.

I confess to your Lordships that in this case I was greatly moved by the dissenting judgment of Lord Moulton in the Court below, supported as it was by the powerful argument delivered by Sir Alfred Cripps on behalf of the appellant. In these circumstances I have given the case anxious consideration.

This workman had entered into an agreement which is of the nature of what is called contracting out of the provisions of the Workmen's Compensation Act. He entered into that agreement upon January 17, 1908, and he accepted a scheme which had been re-certified under the provisions of the statute of 1906, to which I shall now refer.

By s. 15, sub-s. 2, of that statute it is provided that "Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act." There then follows the imposition of a duty upon the registrar by the 3rd sub-section, which provides that he shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms or has been so modified as to conform with the provisions of the Act as to schemes.

My Lords, the argument for the appellant was this: it was said that before the registrar could re-certify a scheme of a new character he was bound to be satisfied in the language of the

sub-section that there had been conformity with the whole provisions of the new statute of 1906 not only quoad this scheme but quoad schemes in general. If so, one of those provisions had in this case undoubtedly not been complied with, namely, the provision which enacts that before a scheme is certified it shall be to the satisfaction of the Registrar of Friendly Societies established that the majority, to be ascertained by ballot, of the workmen to whom the scheme is applicable are in its favour.

My view upon the matter, after consideration, is this: undoubtedly, with regard to a scheme of this character it could not have been a living scheme in the legal sense of the term unless, initially, it had complied with all the provisions of the law applicable at the date of its birth. But this statute of 1906 does not contemplate the granting of a re-certificate in the sense of its being a certificate in all points equal to a new certificate for a new society. I think the true operation and effect of the 1906 Act is to carry forward the old schemes as old schemes, under the guarantee that their contents would, so to speak, be brought up to date and to the same level as regards the rights of the workmen. But I am of opinion that that is exactly what happened in the present case. A new certificate was not required, only a re-certificate. Had a new certificate for a new society been required it is undoubted that the registrar would have had to be satisfied that a ballot had been taken and a majority of the workmen were in favour of the scheme. But the old scheme was thoroughly legal and perfectly valid up to the passing of the 1906 Act, and therefore being legitimately, so to speak, in existence and in operation, it was carried forward with this safeguard, that so far as its contents were concerned and the protection of the workmen was concerned it should be modified to bring it up to date.

My Lords, an excellent illustration occurs in the present case of what is the kind of modification which is required, for s. 3 of the Act of 1906, in sub-s. 3, does make a new provision affecting the substance and content of the scheme. The sub-section stipulates that no scheme shall be so certified which contains an obligation upon the workmen to join in the scheme as a condition of their hiring. That was old. But then came

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My Lords, this contract framed under the terms of the 1897 statute did not contain that latter provision, but a copy has been given to the House shewing the alterations and modifications made, and one of those modifications does include this very power which is expressly given by the new statute, namely, a provision enabling the workman to withdraw. So far as the workman's rights go, therefore, the matter has in fact been brought up to date. All that remains accordingly is the point that something had not happened by way of taking a ballot of the workmen, which thing would have happened as a preliminary to the scheme if that scheme had been new and under the new Act. But that something, my Lords, did not affect the body of the scheme itself; it was something which, as I say, was preliminary as a condition to the formation of any new scheme. When the statute of 1906 passed there was found in operation a prior but a living and a valid scheme: and what was required by the Act of 1906 was that the old and continued scheme should be in such a form and after such modification as protected the workmen's interests and rights.

My Lords, I have thought it right to mention my difficulties in the case and to say that it is only after deliberation that I have come to this opinion. I think that the judgment of the majority of the Court of Appeal was right, and I move your Lordships accordingly.

LORD MERSEY. My Lords, in this case the appellant, a workman, made a claim against the respondents for compensation in respect of an injury sustained by him in the course of his employment. The right to compensation was not disputed, but the parties could not agree upon the question of the amount to be paid. Thereupon the appellant commenced proceedings in the county court under the provisions of the Workmen's Compensation Act, 1906. The respondents objected to the jurisdiction of the Court on the ground that the appellant had contracted himself out of the Act by subscribing to a "scheme" which ousted the jurisdiction of the Court, and the question now is

whether the scheme relied upon by the respondents was in fact operative against the appellant. H. L. (E.)

The scheme in question was originally made under the provisions of the Workmen's Compensation Act of 1897, an Act which is now repealed. Under s. 3 of that Act it was provided that "if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance . . . is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

The scheme was drawn up under this section and was duly certified by the Registrar of Friendly Societies. The Act of 1897 was repealed by the later Act of 1906, but the later Act by sub-s. 2 of s. 15 provides that "every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act." No particular form is prescribed for re-certification; but the scheme was re-certified on December 16, 1907. Some objection was taken by the appellant to the wording of the document re-certifying the scheme; but, in my opinion, the document was clearly intended to operate as a re-certification, and does so. On January 17, 1908, the appellant signed a document agreeing to the terms of the re-certified scheme.

The real objection made by the appellant to the scheme was that, although it was re-certified by the registrar, it ought not to have been so re-certified, and in support of this objection reliance was placed on sub-s. 3 of s. 15 of the Act of 1906. That sub-section provides that "the registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions

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of this Act as to schemes." It was pointed out that by s. 3 of the new Act (which is the section which replaces, though with modifications, the 3rd section of the Act of 1897) it is provided that "if the registrar certifies that a majority (to be ascertained by ballot) of the workmen are in favour of such scheme, the employer may contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme": and it was argued that before the old scheme could "conform with the provisions" of the new Act it was necessary that a ballot of the men should be taken in accordance with the requirements of s. 3 of the new Act. I do not agree with this contention. The ballot forms no part of the scheme itself. It is merely a condition precedent to a scheme under the new Act of 1906 coming into operation. It is true that no ballot of the men was taken before the scheme in question in this case was certified under the Act of 1897; and it is also true that no ballot was taken before the scheme was re-certified under the Act of 1906. But neither Act contains any stipulation for such a ballot. The scheme itself has been re-certified as conforming with or as having been so modified as to conform with the provisions of the new Act, and that is all that the statute requires in order to make it operative.

The words of sub-s. 3 of s. 15 of the Act of 1906 are inapplicable and are therefore not to be read as referring to the provisions in s. 3 of the Act as to a ballot. A scheme cannot conform with nor can it be modified so as to conform with a ballot. For these reasons I am of opinion that the view taken by the majority of the Lords Justices was right and that the appeal fails.

LORD PARKER OF WADDINGTON. My Lords, I am asked to state that Lord Loreburn concurs in the judgment I am about to read.

Under the Workmen's Compensation Act, 1897, it was impossible for a workman to contract out of the benefits of the Act except as provided in s. 3 thereof. Under this section the Registrar of Friendly Societies might, after taking steps to ascertain the views of the employer and workmen, certify that

any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment was on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Act, and upon this certificate being granted the employer might, until the certificate were revoked, contract with any of those workmen that the provisions of the scheme should be substituted for the provisions of the Act, and thereupon the employer was to be liable only in accordance with the scheme. The registrar's certificate might be made to expire at the end of a limited period, not being less than five years. It could also under certain circumstances be revoked. No scheme could be certified which contained an obligation upon the workmen to join the scheme as a condition of their hiring.

This Act was repealed by the Workmen's Compensation Act, 1906. The latter Act also contained provisions precluding a workman from contracting out of the benefits thereof otherwise than in accordance with the 3rd section of the Act. The 3rd section of the Act of 1906 differs, however, in some respects from the 3rd section of the earlier Act. It provides that the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and the workmen, may certify that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Act, and that where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions in addition to the benefits to which the workmen would have been entitled under the Act, and that a majority (ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme. Upon this being done, the employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer is to be liable only in accordance with the provisions of the scheme. The registrar's certificate may be made to expire at the end of a limited period, not being less than five years, and may be renewed with or without modification. It may also under certain circumstances

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be revoked. No scheme can be certified which contains any obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

So far the meaning and effect of the Act of 1906 is reasonably clear, but the Legislature thought proper to make special provision with respect to schemes which, when the Act came into force, were existing schemes duly certified under the earlier Act. Such special provisions are contained in the 15th section of the Act, and give rise to the principal difficulty involved in this appeal. Sub-s. 2 of s. 15 provides that every scheme under the Act of 1897 in force at the commencement of the Act of 1906 shall, if "re-certified" by the Registrar of Friendly Societies, have effect as if it were a scheme under the Act of 1906. Sub-s. 3 of s. 15 provides that the registrar shall "re-certify" any such scheme if it be proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of the Act of 1906 as to schemes. Sub-s. 4 of s. 15 provides that any such scheme not "re-certified" within six months from the commencement of the Act of 1906 shall be revoked. The question is what the Legislature meant by the words "re-certify" and "re-certified" in these sub-sections.

It is, in my opinion, reasonably clear that in re-certifying a scheme the registrar is not merely to certify again what has been already certified under the earlier Act. This would be a futile proceeding. Further, it seems to me equally clear that in re-certifying a scheme the registrar is not required to certify everything required in a certificate under the 3rd section of the Act of 1906. If he were so required, his re-certificate would make the scheme a scheme under the Act of 1906, and there would be no need for the provision that the scheme, if re-certified should have effect as if it were a scheme under the Act of 1906. In my opinion the object of re-certifying the scheme is to shew that the registrar has looked into the matter and is satisfied that the scheme conforms, or has been so modified as to conform, with the provisions of the Act of 1906. No form of re-certificate is provided by the Act, and any form of re-certificate which states, either expressly or by necessary implication, that the

registrar is exercising his power to re-certify would seem to be sufficient.

The question, however, arises as to what are the provisions of the Act as to schemes with which a scheme, in order to be re-certified, must conform, or be so modified as to conform. These provisions are certainly not co-extensive with the matters required to be certified under s. 3. A certificate under s. 3 need not, for example, certify that the scheme contains provisions enabling a workman to withdraw from the scheme. And yet this is a point upon which a scheme, in order to be re-certified under s. 15, must certainly conform with the provisions of the Act. There is, therefore, no reason to expect that every provision of the Act on which the registrar has to certify under the 3rd section must have been observed in order to enable him to re-certify a scheme under sub-s. 3 of s. 15. It is simply a question of the true construction of the words used in that sub-section. In my opinion the words the "provisions of this Act as to schemes" in sub-s. 3 mean those provisions of the Act which prescribe what a scheme is to contain or is not to contain—provisions with which a scheme or modified scheme can properly be said to conform or not to conform. It cannot be properly said that a scheme or modified scheme conforms or does not conform with provisions which do not relate to its contents, but prescribe conditions precedent to its certification under the 3rd section. It follows that, in my opinion, a ballot of the workmen was not essential in order that the modified scheme in question should be re-certified under s. 15, sub-s. 3. I am also of opinion that the re-certificate of the registrar, though it leaves much to be desired in point of form, is a sufficient re-certificate under the sub-section, because it is clear on the face of it that he was intending to grant such a certificate as is required by the Act.

The only other point raised before your Lordships was as follows. It was said that the scheme in question was not such a scheme as was contemplated either by the Act of 1897 or by the Act of 1906, because it purports to oust the jurisdiction of the county court. The jurisdiction of the county court arises under the provisions of the Acts, and by the express words of each Act, if there be a contract with a workman whereby the provisions of

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a certified scheme are substituted for the provisions of the Act, the employer is liable only in accordance with the provisions of the scheme. In other words, the workman cannot resort to any of the provisions of the Act, and is in the same position as if he had been expressly excluded from the benefit of those provisions. In my opinion the case of *Horn v. Lords Commissioners of the Admiralty* (1) was rightly decided.

The appeal therefore fails.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, August 1, 1913.

Solicitors for appellant: *Shaen, Roscoe, Massey & Co.*
 Solicitor for respondents: *Treasury Solicitor.*

[HOUSE OF LORDS.]

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COMMISSIONERS OF INLAND REVENUE APPELLANTS;
 AND
 TRUMAN, HANBURY, BUXTON & CO.,
 LIMITED, AND ANOTHER } RESPONDENTS.

Revenue—Licensed Premises—Annual Licence Value—Basis of Calculation—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 44, sub-s. 2.

By s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, for the purposes of the sub-section the annual licence value of licensed premises shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises, and “in estimating for that purpose the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating

**Present*: VISCOUNT HALDANE L.C., EARL LOREBURN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration"—

Held, (1.) that the ejusdem generis rule of construction did not apply to the words "hotels or other premises used for purposes other than the sale of intoxicating liquor," and, consequently, that a public-house which derived part of its profits from the sale of non-intoxicants fell within this provision; (2.) that the words "increased value" meant only the extra value arising from the profits of the trade in non-intoxicants due to the fact that the trade was carried on on licensed premises, and not the total value arising from the profits of that trade.

Decision of the Court of Appeal [1912] 3 K. B. 377, affirmed on the first point and reversed on the second point.

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APPEAL from an order of the Court of Appeal varying an order of Hamilton J. (1)

The respondents were the owners and the licensee respectively of a fully-licensed public-house known as "The Eagle Wine and Spirit Establishment," No. 217, Great College Street, N.W., in the county of London. The business carried on on these premises consisted mainly of the sale of intoxicants, but, as incidental thereto and as part of the ordinary business of a public-house, mineral water, tobacco, and cigars were supplied, and a small trade was done in luncheons and the provision of food.

This appeal raised a question upon the construction of the concluding paragraph of sub-s. 2 of s. 44 of the Finance (1909-10) Act, 1910, as to the basis upon which the licence value of these premises for the purposes of that Act ought to be ascertained. (2)

(1) [1912] 3 K. B. 377.

(2) Sect. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, enacts as follows:—

"It shall be the duty of the Commissioners to prepare, and to keep corrected, a register showing the annual licence value of all fully-licensed premises and all beerhouses.

"For the purpose of this provision the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would

bear if they were not licensed premises, those values being calculated on the same basis as that on which the amount to be paid as compensation under section two of the Licensing Act, 1904, is calculated in default of agreement and approval in cases where compensation is payable under that Act, but there shall not be included in the value of the premises as licensed premises any amount on account of depreciation of trade fixtures."

[The sub-section then provided

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The appellants, by a certificate dated July 21, 1911, made by them with respect to the "Eagle" public-house pursuant to the powers conferred on them by this section, fixed and certified (a) the annual value of the premises as licensed premises at 1503*l.*, (b) the annual value which the premises would bear if unlicensed at 300*l.*, and (c) the annual licence value of the premises at 1203*l.*

The respondents appealed to the King's Bench Division against the valuation of the premises as licensed premises as being excessive. For the purposes of this litigation it was agreed that 300*l.* represented the annual value which the premises would bear if unlicensed, and that 97*l.* represented the total average net profits derived otherwise than from the sale of intoxicants.

The two substantial questions raised by the appeal were (1.) whether the "Eagle" public-house fell within the words "hotels or other premises used for purposes other than the sale of intoxicating liquor" in the concluding paragraph of sub-s. 2 of s. 44, it being contended by the Commissioners that it was excluded on the ejusdem generis principle, and (2.) whether in estimating the value of the premises as licensed premises for the purpose of arriving at the annual licence value thereof the words "increased value" meant the whole value arising from the net profits obtained otherwise than from the sale of intoxicants or only the value arising from the extra profit due to the fact that the business in non-intoxicants was carried on on licensed premises.

Hamilton J. found upon the evidence that, subject to any deduction to be made under the said concluding paragraph, the annual value of the "Eagle" public-house as licensed premises was 1545*l.* and the annual licence value of the premises 1245*l.*, and upon the question of construction he held that the concluding

that the annual licence value should be fixed and certified for the purposes of the Act by the Commissioners of Inland Revenue, and that the certificate of the Commissioners should be subject to appeal as therein mentioned; and it concluded as follows:—}]

"In estimating for that purpose

the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration."

paragraph of sub-s. 2 of s. 44 applied to the "Eagle" public-house, but that the paragraph authorized only the deduction of the element of profit attaching to the sale of non-intoxicants by reason of their being sold on licensed, instead of on unlicensed, premises. The learned judge also held that any deduction on account of the said increased value was a deduction from the sum of 1545*l.* Thereupon it was admitted by the respondents that, upon the construction placed upon the concluding paragraph by the learned judge, the amount to be deducted would not reduce the annual value of the premises as licensed premises below the sum of 1503*l.* or the annual licence value thereof below the sum of 1203*l.*, being the values certified by the appellants; and the appellants did not ask to have the values inserted in their certificate increased to the higher figures determined as the annual values by the learned judge.

The respondents appealed to the Court of Appeal from this decision upon the question of the meaning of "increased value," and upon another point as to which no question arises, and upon that appeal the present appellants (the Commissioners) contended that the concluding paragraph was confined to hotels and premises ejusdem generis. The Court of Appeal (Cozens-Hardy M.R. Farwell L.J., and Kennedy L.J.) held (so far as material), first, affirming the decision of Hamilton J., that the "Eagle" public-house was within the concluding paragraph, and, secondly (Kennedy L.J. dissenting), reversing the decision of Hamilton J., that in estimating the value of the premises as licensed premises no part of the profits not derived from the sale of intoxicating liquor was to be taken into consideration, and they ordered that the annual licence value should be reduced to 1148*l.* accordingly.

The appeal to this House was twice argued, first on April 10, 11, 14, 15, 1913 (before Viscount Haldane L.C., Lord Atkinson, and Lord Parker of Waddington), and, secondly, on June 5, 6, 9, 1913.

Sir Rufus Isaacs, A.-G., and *Sir John Simon, S.-G.* (with them *Lowenthal*), for the appellants. Under sub-s. 2 of s. 44 of the Finance (1909-10) Act, 1910, the annual licence value of licensed premises is the difference between the annual value of the

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premises as licensed premises and the annual value which those premises would bear if not licensed. But by the proviso at the end of the sub-section it is provided that, in estimating for the purpose of ascertaining the licence value the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration. The question is what is the meaning of "increased value" in that proviso. The appellants contend that the intention of the proviso was to exclude the enhanced profits on non-intoxicants derived from the fact of their being sold on licensed premises. The respondents contend that the intention was to exclude all the profits derived from the sale of non-intoxicants. The profits arising otherwise than from the sale of intoxicants would include profits on the sale of mineral waters and cigars and provisions, and, in the case of hotels, profits on the letting of rooms; and the profits derived from these sources are usually higher when made upon licensed premises than when made upon unlicensed premises. Take for example the profits derived from the sale of mineral waters. It is well known that mineral waters are usually sold at higher prices and in larger quantities when sold on licensed premises than when sold on premises having no licence. It is the enhanced profit due to the existence of the licence which the Legislature says is to be excluded. The respondents' contention gives no effect to the word "increased," which upon their construction might be just as well omitted. Moreover, that construction involves that the annual value from non-intoxicants would be deducted twice over, and in the case of big hotels, where the annual value of the non-intoxicant business largely exceeds the value of the profits derived from the sale of intoxicants, the annual licence value, though existing in fact, would appear as nil. The proviso cannot be construed in such a way as to destroy the whole basis of calculation provided by the earlier part of the sub-section. The Legislature presupposes that the licence adds to the value of the licensed premises, and it cannot have intended by virtue of the proviso to cut down the annual value of the premises as licensed premises for the purpose of ascertaining the annual licence value

to a mere shadow of its former self. The same words occur in s. 4 of the Licensing Act, 1904, which is now replaced by s. 14 of the Licensing (Consolidation) Act, 1910. The object of s. 4 of the Act of 1904 was to provide for the payment, in the interest of the public, by every applicant for a licence of a sum of money representing the value due to the licence, therein described as the monopoly value. Upon the respondents' construction it is impossible to make sense of that section. [They also referred to s. 2 of the Licensing Act, 1904, now replaced by s. 20 of the Licensing (Consolidation) Act, 1910, and to *Ashby's Cobham Brewery Co. and Ashby's Staines Brewery Co.* (1)]

Sir Alfred Cripps, K.C., and Walter Ryde, K.C. (with them *Konstam*), for the respondents. In this proviso the Legislature intended to exclude the profits derived from non-intoxicants. If those profits are brought in an increased value is obtained, and the meaning is that the value of the premises is not to be increased by taking into consideration those profits. In comparing a higher value with a lower one the word "increased" is appropriate as applied to the higher value. The mistake of Hamilton J. was in applying the word to the profits instead of to the value of the premises. The Act says nothing about direct and indirect profits, or simple and enhanced profits, from non-intoxicants; it does not differentiate between them. It is sought by the appellants to eliminate the element of profit which is due to the licence, but that is precisely the element which one would naturally expect would be included, and the Act contains no indication pointing to the increase as being due to the licence. The object of the proviso in making the abatement was to encourage the supply of food and non-intoxicants in all licensed premises while discouraging the trade in intoxicating liquor. The construction put upon the words by the respondents gives them their obvious and natural meaning. The argument that this construction would result in a double deduction is fallacious. The Legislature is dealing with two different subject-matters. In the one case the deduction is made in respect of an actual business and in the other case in respect of a hypothetical business. As regards the anomalous results which are said to

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flow from the respondents' construction, in the only cases in which an option is given to pay duty on the licence value the Commissioners are protected by a minimum duty: Finance (1909-10) Act, 1910, s. 45; First Schedule, scale 3, and Provisions applicable to Retailers' On-licences, clause 3.

Sir Rufus Isaacs, A.-G., replied.

[Upon the first argument the appellants contended that the proviso was not applicable to the "Eagle" public-house, but was confined to hotels and other premises ejusdem generis, but upon the second argument they abandoned this contention.]

The House took time for consideration.

July 7. VISCOUNT HALDANE L.C. (1) My Lords, this appeal arises in proceedings on a petition of the respondents presented to the High Court of Justice under s. 44, sub-s. 2, of the Finance Act, 1910. Several questions of fact and law were decided in the course of these proceedings. But the only question which remains, and is now before your Lordships' House, is one of law, relating to the construction of the section.

The Act imposes on the Commissioners of Inland Revenue the duty of preparing and keeping corrected a register shewing the annual licence value of licensed premises. This annual licence value is to be the amount by which the annual value of the premises as licensed exceeds the annual value which the premises would bear if not licensed. These values are to be calculated on the same basis as that on which the amount to be paid as compensation under s. 2 of the Licensing Act, 1904, is calculated, but there is not to be included in the value of the premises as licensed any amount on account of depreciation of trade fixtures. A clause which is introduced later on in sub-s. 2 of s. 44, which directs the valuation, provides that, in estimating for that purpose (i.e., the ascertainment of the annual licence value) the value as licensed premises of hotels and other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor is to be taken into consideration.

(1) Read by Earl Loreburn.

The appellants fixed the annual licence value of a public-house belonging to the respondents, and known as the "Eagle," at an amount which it is not now material to specify. There was an appeal which came before Hamilton J., and that learned judge decided that the annual value of the premises was 1545*l.*, and that the annual value as unlicensed was 300*l.* He further decided two questions which were raised before this House, both of which turned on the construction of the clause which I have already quoted of sub-s. 2 of s. 44. The first of these questions was whether the case of the "Eagle" public-house came within the words "hotels or other premises used for purposes other than the sale of intoxicating liquor" in this clause. Hamilton J. held that it did fall within the words, and the Court of Appeal has agreed with him in the view that the rule of ejusdem generis does not apply so as to cut down the wide significance of the words "or other premises," and consequently that the "Eagle" public-house was within the scope of the clause. The present appeal has been twice argued, and the point that the rule applied so as to exclude a public-house was taken on the first argument but not on the second. As it is not now pressed for the appellants, I do not refer to it further than to say that I agree with the view taken by both Courts below, that the Crown could not succeed on it.

The second point is quite a different one. The respondents contend that the clause which I will refer to as the "proviso," an expression used in the course of the argument, means that before making the deduction directed by s. 44 from the annual value of the premises as licensed of the value which the premises would bear if not licensed, a preliminary deduction is to be made of all value arising from profits not derived from the sale of intoxicating liquor. This was the interpretation placed on the proviso by the Master of the Rolls and Farwell L.J., who formed the majority in the Court of Appeal. The appellants argued for a different construction, which was that placed on the words by Hamilton J. and Kennedy L.J. Upon this construction all that the proviso directs is that in estimating the value as licensed premises there should be excluded from consideration the element of value which arises from the increase in price or

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quantity of non-intoxicants due to the advantage which the possession of a licence has conferred. The sale of spirits in a public-house may, it is said, increase the price and volume of its trade in mineral waters, and the possession of a licence may enable an hotel to make higher charges for accommodation. It was proved in the Courts below that this was so in point of fact, and in this appeal we have been informed that there is no serious controversy as to the figures which will result according as one construction or the other is adopted.

My Lords, the question before the House is thus one solely of the interpretation of the words of this proviso. In order to come to a conclusion about it I think it necessary to refer to certain other provisions of the Licensing Acts. The Licensing Act of 1904 is now repealed, but its provisions are substantially re-enacted in the Licensing (Consolidation) Act, 1910. Sect. 20 of the latter Act, which corresponds to s. 2 of the earlier one, provides for the compensation of the holder of an old on-licence, if his licence is taken away, on the basis of payment to him of a sum equal to the difference between the value of the licensed premises, including any depreciation of trade fixtures occasioned by the refusal to renew, and the value which the premises would bear if without a licence. It is obvious that this provision refers to existing rights which have been put an end to and not to any prospective valuation, such as that under consideration in the case before us. Sect. 14 of the later Act substantially re-enacts s. 4 of the older Act, and more nearly resembles, both in what it deals with and in its language, the provision under consideration. It aims at securing, on the grant of a new on-licence, payment in the interest of the public for what it terms the monopoly value. This it defines as the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed. But, unlike s. 20, it contains a proviso closely resembling in its language the one which we have to construe. For, in estimating the value of licensed premises, where the profits are not wholly derived from the sale of intoxicating liquor, it directs that no increased value arising from profits not so derived is to be taken into consideration.

My Lords, s. 14 deals, not with the annual value of the licence, but with its capital value. But it is obvious that there is a close analogy between the two. The annual licence value directed to be estimated by s. 44 of the Finance Act of 1910 is made use of both in s. 45, which makes it the foundation of an alternative mode of paying a reduced duty in the case of hotels and restaurants, and in the provisions in the First Schedule applicable to retailers' on-licences. Sect. 45 and the schedule allow in certain cases an alternative mode of paying duty, based, not on the annual value of the licensed premises, but on the annual licence value. But in the cases so dealt with, both under s. 45 and under the provisions in the schedule to which I have referred, a lower limit is provided in the shape of a minimum duty. This is not done in the case of monopoly value under s. 14 of the Licensing Consolidation Act, and the result is that, if the construction of the proviso to that section contended for by the respondents in reference to the similar language of the proviso to s. 44 of the Finance Act of 1910 be adopted, the public might in many cases lose the monopoly value altogether. For if the words "no increased value arising from profits not so derived" mean that the whole of the value arising from profits made by the sale of non-intoxicants is to be deducted, as distinguished from the mere increase in these profits brought about by the fact that the sales take place on licensed premises, it is obvious that the equivalent of what is directed to be eliminated in estimating the capital value of the licensed premises may in another form be deducted when the value of the premises as if they were not licensed is subtracted as the section directs. When dealing with the value of hotels or restaurants, where a large part of the profits may arise from the provision of accommodation and the sale of food, this might often be so.

It is, in my opinion, impossible to say with truth that the one deduction is based on a calculation of actual profit and the other on an estimate of annual value. In both instances the only way in which actual profits come in is as evidence of the value of the premises. That value is, however, to be estimated prospectively, and not by looking at this or that item separately. It represents what a bidder in the market would think it worth while to give

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for the premises, taking into account every means by which he could make a profit by trading on them. The value of the premises as licensed must, therefore, *prima facie* include profits which he can make by selling on them non-intoxicants as well as intoxicants, and if in estimating the value as licensed you are under the proviso to deduct all prospective value anticipated from the profit in the sale of non-intoxicants, and then separately all value estimated on the basis of selling non-intoxicants to the extent that seems probable if the premises were unlicensed, it is to my mind plain that in many cases the deductions will overlap and become a double deduction of what is substantially the same thing.

My Lords, as under s. 14 the dominant intention of the language is obviously to secure for the public the monopoly value in all cases, I am unable to read the words of the proviso to this section in any other sense than that the deduction is to be only of the increase of value which is due to the licence, although that increase of value arises from the sale of non-intoxicants.

But if this be the true reading of s. 14 it has an important bearing on the construction of the words which we have to construe. For the language of s. 14 only reproduces the earlier words of s. 4 of the Licensing Act of 1904, and these words must have been present to the mind of the draftsman of the Finance Act of 1910 when he repeated them in selecting the words of the proviso to s. 44. It is not conceivable that in a case so closely resembling that of monopoly value as does the definition of annual licence value he should have used the same words without intending the same result. And not only does the scheme of s. 44 point to this conclusion, but the ordinary principles on which statutes are interpreted appear to me to require it. One of these principles is that, where it is possible, a meaning should be given to every word used. A meaning must, therefore, be given to the word "increased" in the proviso, and I have no difficulty, on the construction I have suggested, in finding a meaning for this expression. The value of the premises as licensed is the entire value taking all sources of profit into account, and these sources are threefold. There is value derived

from the right to sell intoxicants, value derived from the supply of everything that can be supplied apart from the licence, and value arising from the fact that the advantage of possessing a licence enables the licence holder to improve his trade in point both of price and of quantity, as regards these other things. The excess of the value of the premises as licensed over their value as not licensed includes the total increase of value arising from the first and third of these advantages, and it is that part of the total increase which is attributable to the third of them that appears to me to be indicated when the proviso directs that, in estimating for the purpose of ascertaining annual licence value of hotels or other premises used for objects other than the sale of intoxicants, no increased value arising from profits not derived from the sale of intoxicants is to be taken into consideration. The construction placed on this language in Farwell L.J.'s judgment appears to me to fail to give that meaning to the word "increased" of which the expression is naturally susceptible. Moreover, his construction, which is that really underlying the entire argument of the respondents, would lead to the escape of many hotels and restaurants from duty on anything like the scale on which other licensed premises have to pay, the diminution of the rate being altogether inadequately guarded against by the provisions as to minimum duties in s. 45 and in the schedule. I do not think that such an intention is to be attributed to those who framed the statute if, as I think it does, the language of the proviso lends itself naturally to a different construction.

For the reasons I have assigned, I think that the contention on the point before us of the appellants is right, and that the appeal must succeed. But as the appellants have failed on the other point, as to the meaning of the words "hotels or other premises," and also because the main question is one which the parties have arranged to bring before the Courts for the settlement of a novel and far-reaching controversy, I think that the appellants and respondents should each bear their own costs of this appeal, and that we should simply declare that on the true construction of sub-s. 2 of s. 44 the premises known as the "Eagle public-house" fall within the words "hotels or other premises used for purposes other than the sale of intoxicating liquor," and

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that the words "increased value" mean increased value due to the licence although arising from profits not derived from the sale of intoxicating liquors. My Lords, I move accordingly.

EARL LOREBURN. My Lords, in view of the full examination to which the provision at the end of s. 44, sub-s. 2, has been subjected in the Court of Appeal and in the opinions of your Lordships, which I have had the advantage of seeing in print, I need say very little. In my opinion the "increased value" which, according to the statute, must not be taken into consideration is that increment in the value of the premises "arising from profits not derived from the sale of intoxicating liquor" which is caused by the fact that the premises are licensed. A man may let more bedrooms or sell more mineral water, for example, and at better prices, because he has also a licence. If this is not the meaning, then the word "increased" might be omitted without affecting the sense, and though that would not necessarily be a conclusive, yet it is a weighty argument. I cannot account for the presence of that word "increased" unless it means what I have said.

I understood at the hearing that the construction was the point to be adjudicated, and that the parties could apply the decision to the facts. If they cannot agree, I suppose the House will be asked for a more specific direction, but the order of the Court of Appeal cannot stand.

Some questions were discussed as to the effect and the correctness of Kennedy J.'s judgment in an earlier case relating to compensation. It seems better to express no opinion upon either point until the matter is formally raised and argued here.

LORD SHAW OF DUNFERMLINE. My Lords, I am so satisfied with the judgment of Mr. (now Lord) Justice Hamilton in this case that I should have been very willing to content myself with adhering to that learned judge's opinion. But out of respect for the majority of the Court of Appeal I think it right to set forth in my own words my conclusions—in agreement with those of Kennedy L.J.—on the particular point of construction of the statute which formed the only question under discussion.

By s. 44, sub-s. 2, of the Finance Act, 1910, "it shall be the duty of the Commissioners to prepare, and to keep corrected, a register showing the annual licence value of all fully licensed premises and all beer-houses"; it was provided that this annual licence value should be fixed and certified by the Commissioners of Inland Revenue; and rights of appeal were given against that fixture and certificate. It is under that procedure that the case comes before your Lordships' House.

The respondents are the owners and tenant of a public-house in Great College Street, in the north-western district of London, known as the "Eagle." On July 21, 1911, the Commissioners issued their certificate, finding (a) that "the annual value as licensed premises" was 1503*l.*; (b) that the annual value which the premises would bear if not licensed was 300*l.*; and (c) that the annual licence value, arrived at by deduction of (b) from (a), was, of course, 1203*l.* The appellants, according to the judgment of Hamilton J., would have been justified, upon the facts proved, in entering a larger value than this. That judge set the annual value as licensed premises at 1545*l.*, and from his figure the Court of Appeal docked 97*l.*, leaving a net result of 1448*l.* as the value of the licensed premises, and reducing accordingly the annual licence value to 1148*l.* No importance attaches to the particular figures, but very considerable importance is said to attach to the principle upon which the Court of Appeal, on the one hand, and Hamilton J., on the other, proceeded.

This requires a careful scrutiny of the sub-section already mentioned, namely, s. 44, sub-s. 2, of the Finance Act. As stated, it requires the preparation of a register shewing the annual licence value. It goes on to prescribe that this annual licence value "shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises," and it then sets forth that the values are to be calculated on the same basis as that on which the amount to be paid as compensation under the Licensing Act of 1904 is calculated. The Licensing Act of 1904 has, along with other statutes, been codified by the existing Licensing (Consolidation) Act, 1910 (10 Edw. 7, c. 24), and s. 14, sub-s. 1, does not add any

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new idea as to the mode, or fresh element as to the material, of calculating what is called the monopoly value which is by that statute to be secured to the public. For that monopoly value is to be represented "by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." The idea throughout in the two statutes is to compare the value of unlicensed with the value of licensed premises, and the assumption of both statutes is that the latter will exceed the former. In so far as it does so, this is the annual licence value.

But in getting at the annual licence value there may be ground for not inconsiderable confusion unless care is taken with regard to what I may call the gross element of the computation, namely, the annual value of the whole premises as licensed premises; and the ascertainment of that figure is of great and separate importance. In arriving, accordingly, at an estimate of the annual value as licensed premises, it is necessary to attend particularly to what the statute prescribes on that subject. Its language is as follows: "In estimating for that purpose—(i.e., the purpose of getting at the annual licence value)—the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration." The same sub-section has already prescribed the operation of deduction from the gross value of the premises as licensed of their annual value if they were not licensed, but that does not conclude, in the view of the statute, the operation until one first says how, in putting down the gross value of the premises as licensed, you are to proceed. The statute accordingly, in the passage cited, declares that no increased value arising from profits not derived from the sale of intoxicants shall be taken into consideration. In my opinion, it means thereby that the non-intoxicant trade may by reason of the licence be a larger or more profitable trade than it would have been without the licence; that the ordinary unlicensed trade in non-intoxicants might yield a certain amount of profit, and that amount of profit would be an element in the value of the premises as unlicensed; but that with regard to a business yielding profits not derived from the

sale of intoxicants, though conducted on licensed premises, more trade, extra consumption, and larger profits might not unnaturally result, and these are solely to be attributed to the licence itself. It is this extra, enhanced, or "increased" value which the passage cited from the statute expressly declares is not to be taken into consideration in estimating the gross value as licensed premises.

Analogies, figures, and even illustrations often fail to elucidate a subject, but the illustration which has struck my mind as the most helpful is as follows. I take the familiar case of a temperance hotel for which a licence to sell intoxicants is afterwards obtained. The premises were suitable for either kind of business. When unlicensed the determining factor as to their annual value was the amount of profit derived from the business as a whole, which might be from residential accommodation or from goods supplied,—from what may be generically termed non-intoxicant business.

But the annual value of the same premises when licensed depends, not upon one, but upon three determining factors: (a) To begin with, there are profits from the sale of intoxicants as authorized by the licence; but there are two other factors, namely, (b) that there are the same profits arising from non-intoxicant business as before; while there is a third factor, namely, this, (c) the increased profits derived from non-intoxicant business by reason of the premises having obtained the facilities and conveniences of a licence. A familiar illustration is, say, that mineral waters may be sold in larger quantity than before, and at, perhaps, double the price. This last element (c) is not a profit depending upon the licence in the sense that that business would have been illegitimate without the licence, but it is dependent upon the licence in the other and practical sense, that had the premises in which it was conducted not obtained the licence, the increased overturn and increased profit would not have been obtained. What the statute does is to say that that element, which is thus practically dependent from a business point of view upon the licence, is not to be included in the gross annual value of the licensed premises when you are engaged in making the calculation with regard to the annual licence value.

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H. L. (E). The statute does not permit the whole value of non-intoxicant business to be excluded from the annual value of the licensed premises, but only the increased value which the licence in practice has given to such non-intoxicant business. Thereafter, when the annual value of the licensed premises has been adjusted in this way, then the operation takes place of deducting from that what would have been the value of the premises as unlicensed. If the gross value had been 1000*l.*, item (a)—its profits from the sale of intoxicants—might have been 400*l.*; item (b)—its profits as an unlicensed house—might have been 500*l.*; and item (c)—its increased profits not derived from intoxicants, but increased in value or profit by reason of the licence as described—would have been 100*l.* While the gross value was 1000*l.*, the statute declares that, when engaged in the operation of getting at the annual licence value, the gross value must not include item (c). The 1000*l.*, accordingly, must not include the 100*l.*, and will stand at 900*l.* Then comes the process of deduction. You are to deduct from that figure the value which the premises would have been worth if unlicensed, namely, 500*l.*, and the net annual licence value is thus 400*l.*

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The consequence of this calculation is to disentangle completely the annual licence value, and to confine it rigidly to such value as is derived from the sale of intoxicants within the premises.

The argument of the respondents was that, in stating the gross annual value, you had to exclude, not the "increased value" as the statute prescribes, but all the value derived from non-intoxicant business. If you did that in the illustration given, you would exclude not only item (c), but item (b), and 600*l.* would be taken off the gross 1000*l.*, and 400*l.* would be entered as the annual value of the licensed premises. The statute, however, prescribes that you are thereafter to deduct from that figure their annual value when unlicensed. That was 500*l.* The operation is impossible. I am not prepared to say that such impossibility demonstrates that the respondents' contention is unsound, but I think it fairly illustrates the danger of eliminating from the term "increased value" the word "increased." When that elimination takes place confusion ensues; when the word "increased"

is given proper effect to, the calculations proceed with smoothness. In my view they ought so to proceed, and I do not myself see much difficulty in applying to this Act the ordinary principle of the interpretation of statutes, namely, that due effect ought to be given to all the terms employed, except in cases of repugnancy or logical impossibility.

For these reasons I am of opinion that the principle of the judgment of Hamilton J. should be reverted to, and the judgment of the Court of Appeal reversed.

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LORD MOULTON. (1) My Lords, by s. 44 of the Finance (1909-10) Act, 1910, a duty is imposed on the Commissioners of Inland Revenue to prepare and to keep corrected a register shewing the "annual licence value" of all fully-licensed premises and all beerhouses. By the same section it is provided that the "annual licence value" is to be taken to be the amount by which the "annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises." By a further provision in the same section the Commissioners are directed to send to the licence holders a certificate stating the two annual values above mentioned, by reference to which the "annual licence value" has been arrived at. The question for our decision in the present case is as to the proper mode of performing the duty thus laid upon the Commissioners.

No difficulty arises in connection with "the annual value which the premises would bear if they were not licensed premises." This would be determined by application of the ordinary principles of rating. But the same is not the case with the ascertainment of the "annual value of the premises as licensed premises." With regard to this there is a special proviso in the Act in the case of "hotels and other premises used for purposes other than the sale of intoxicating liquor." In these cases the statute provides that "no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration." The dispute between the appellants and the respondents is as to the meaning and effect of this

(1) Read by Lord Shaw of Dunfermline,

H. L. (E.) provision, and your Lordships are asked to decide what is its proper interpretation.

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So stated, I do not think that the answer to the question raised by this case is either doubtful or difficult to arrive at. The length and intricacy of the arguments have, in my opinion, arisen from the fact that the parties have by agreement adopted certain figures as representing the numerical results which would follow from the acceptance of their several contentions. These numerical results are based upon figures appearing in the evidence of certain expert witnesses who have valued the premises by the methods in ordinary use. No doubt in practice these methods give approximate values which may safely be relied on by persons wishing to sell or buy licensed houses, but they are not based on any correct or exhaustive analysis of the legal incidents of rating. In this way the argument on the interpretation of the statute has insensibly been led astray by considerations wholly foreign to it. I propose, my Lords, to confine myself to the question of the true interpretation of the provisions of the statute, and having determined this, I shall proceed to indicate what consequences it will have in the present case in view of the agreements between the parties, without in any way expressing my approval of the figures adopted or the mode in which they have been obtained.

In order to arrive at the annual value of the premises when licensed, i.e., the rent which the hypothetical tenant will give to occupy them, I shall proceed to consider in the first place what are the advantages that he acquires by their possession. For the purposes of the present case they may conveniently be classed under the following three heads:—

I. The possession and use of the fabric, and the enjoyment of all its capacities for earning profits in trades which do not require a licence.

II. The opportunity of obtaining enhanced profits in trades which do not require a licence due to the fact that the premises are licensed and that alcoholic liquors are sold thereon. It is common ground that this is a very real and substantial portion of the advantages of possessing a licence. For example, mineral waters can be sold on unlicensed premises, but if those premises acquire a licence the holder will be able to sell mineral waters

in larger quantities and at a higher price than he otherwise could. I cite this only as an illustration. It was admitted before us by both parties that similar considerations apply to other trades.

III. The opportunity of making profits from the sale of alcoholic liquors.

These exhaust the advantages possessed by the occupier of the licensed premises. We have now to ascertain the annual value of the possession of these advantages.

The annual value of I. is easy to arrive at. The advantages there set out are precisely those possessed by the unlicensed premises, and therefore their annual value is equal to the "annual value which the premises would bear if they were not licensed premises."

It might well be a very difficult problem to ascertain the annual value of II., but we are saved this difficulty. The proviso in the statute enacts that in valuing the licensed premises for the purposes of this statute this head of advantages due to the licence shall not be taken into consideration. We may therefore dismiss II. entirely.

There remains III., i.e., the profits derived from the sale of alcoholic liquors. The annual value of the opportunity of making these profits due to the occupation of the premises is easily determined in the ordinary way.

Summing up, therefore, we find that the "annual value of the premises as licensed premises" when estimated according to the provisions of the Act is equal to the "annual value which the premises would bear if they were not licensed premises" plus the increase in that annual value due to the possibility of making the profits of the trade in alcoholic liquors. Now, in order to obtain the "annual licence value" the statute directs us to deduct from the above "the annual value which the premises would bear if they were not licensed premises." On doing so, there is left only the added value due to the possibility of earning the profits of the trade in alcoholic liquors. It follows, therefore, logically and necessarily, that (although not so expressed in the Act) the "annual licence value" is equal to the additional rent which a hypothetical tenant of the premises would give for the

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privilege of making the profits due solely to the trade in alcoholic liquors.

This result makes the calculation of the “annual licence value” very simple. But it is also very just. The licence holder cannot complain that the “annual licence value” is based on the profits of the trade in alcoholic liquors, because no portion of that trade could be carried on without the licence. But at the same time it preserves to him the full benefit of the very generous concession made by the Legislature in directing that the enhancement in the profit of other trades, which is due to the existence of the licence, should not be taken into consideration in ascertaining the “annual licence value.” Moreover, it entirely gets rid of the anomalies which were suggested in the course of the argument, whereby on certain interpretations of the statute large hotels might have no “annual licence value.” Whatever be the nature of the house, or of the other purposes for which it is used, all licensed premises will have the “annual licence value” which is due to the alcoholic liquor consumed thereon and to nothing else.

It will be seen that in the above I have adopted the construction of the proviso contended for by the appellants. I am of opinion that this interpretation is clearly the correct one. The section deals throughout with the contrast between the annual value of premises with and without a licence, and the “increased value” of which the proviso speaks relates, to my mind, undoubtedly to such increase as is due to the existence of the licence.

The contention put forward by the respondents amounts to omitting the word “increased” and reading the proviso as though it were “no value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration.” Apart from the fact that these are not the words of the statute, it is easy to see that such an interpretation would lead to absurd conclusions and gross injustice in many cases which are not of an exceptional or anomalous type. Suppose, for instance, that there is a large hotel, the annual value of which, without a licence, would be 5000*l.* a year, and suppose that with a licence it would do an alcoholic trade which in itself would justify an annual value of 2000*l.* a year and no more. Counsel for

the respondents would have us reject everything but the 2000*l.* per year in arriving at the "annual value of the premises as licensed premises." But in order to obtain "the annual licence value" we must deduct from this "the annual value which the premises would bear if they were not licensed premises," i.e., 5000*l.* We might thus arrive at the conclusion that the "annual licence value" of such premises was less than nothing.

I turn now to the question of the form of the judgment that this House should give in this case. The substantial purpose of the litigation was to arrive at the correct interpretation of the statutory proviso. As I have already stated, the contention of the appellants on this point is, in my opinion, correct, and that of the respondents is incorrect, so that the appellants have substantially succeeded, and the appeal must be allowed. It follows that I agree with the declaration proposed by the Lord Chancellor and consider that nothing further is needed. But it would seem that the importance to the parties and to the public generally of the principle thus established is great, though the amount involved is, in this instance, small. Accordingly (as I learn from the statements of counsel at the Bar) the parties, at an earlier stage of the proceedings, came to an agreement that if the appellants' contention were accepted the annual licence value should be taken as 1203*l.*, the amount fixed by the Commissioners, and that if the respondents' contention were accepted the annual licence value should be reduced to 1148*l.* I treat these figures as purely symbolic—adopted to save the expense of a possible reference back in respect of a matter of such small pecuniary value. For these reasons—and solely on this account—I am content that in allowing the appeal we should (in conformity with the arrangements made between the parties) formally dismiss the petition, thus leaving the annual licence value at 1203*l.* as fixed by the Commissioners.

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LORD ATKINSON. (1) My Lords, the sole question for decision in this case is the proper construction of the concluding clause of s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910. And that question again resolves itself into this: What is the particular

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thing, described in the clause as "increased value," which is to be left out of consideration in arriving, in accordance with the provisions of the sub-section, at the annual licence value of licensed premises and beerhouses?

The clause to be construed only applies to cases where some trade is carried on in the licensed premises in addition to the trade in intoxicants, or some commodities are sold other than intoxicants, and the initial step in the operation to which this clause refers is identical with that which must, under the provisions of the 20th section of the Licensing (Consolidation) Act, 1910, be gone through in order to ascertain the amount of compensation to be paid to a publican the renewal of whose licence is refused, and, under the provisions of the 14th section of the same statute, be also gone through in order to ascertain the so-called monopoly value which is to be secured to the public. The third occasion on which the operation must be performed is when, under this sub-s. 2 of s. 44, the annual licence value is to be determined.

The operation consists in deducting the value of the licensed premises as unlicensed from their value as licensed. In each of these instances it is, I think, contemplated that the value of the premises as licensed will exceed their value as unlicensed. In s. 44, sub-s. 2, the words are: The annual licence value shall be taken to be the amount by which the annual value of "the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises." It is, therefore, clear that in the contemplation of this sub-section, at all events, an increased value is given to the premises by reason of the licence and the rights and privileges it confers, and the sub-section shews that one of the elements which contributes to this increased value, or what is the same thing, this increase in the value conferred by the licence, is, in the case of mixed trading, to be found in profits arising otherwise than from the sale of intoxicants.

It would appear to me that the divergence in the view taken of the construction of this final clause of the sub-section is due to the fact that it has not been steadily kept in view that the problem with which the sub-section is conversant is the fixing of the

annual licence value of the premises. And I have myself been from the first quite unable to understand why any increase in value arising from something not in any way due to the licence, something which may have existed before the licence was given, and may remain after the renewal of the licence has been refused, should be regarded, or taken into account, in estimating, either the monopoly value of the licence, or the annual licence value of the premises. Increases in value arising from something unconnected with the licence do not appear to me to be germane to the authorized inquiry.

The annual value of the premises as licensed is ascertained, I presume, by estimating what a hypothetical tenant would be willing to pay for the privileges of using and occupying them with all their advantages and possibilities. I include in that all the privileges conferred by the licence, and, amongst others, the privilege of selling in them intoxicants, as well as that of selling in them other commodities. And the value of the same premises if unlicensed is, I presume, to be ascertained by the same method, namely, by estimating what the hypothetical tenant would give to possess and enjoy them with all their capacities and possibilities in their unlicensed state, including in that their fitness for carrying on in them a trade other than the trade in intoxicants. If the carrying on of this trade should not be the most profitable use to which they could be put, then the hypothetical tenant would, presumably, have regard to the more profitable use of which they were capable. Their value would be enhanced by their capacity for it, but the statute appears to assume that the increased value which the licence confers is ascertained by the prescribed comparison of the two values mentioned.

Now, in the case where a mixed trade is carried on, two classes of pecuniary benefit may flow from the possession of the licence and be directly due to it:—first, the profits derived from the sale in the licensed premises of intoxicants, and, second, the enhanced profits derived from the sale there of non-intoxicants. The fact that these two profits may be thus realized, and are both due to the possession of the licence, would necessarily be taken into account by the hypothetical tenant in

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offering for the licensed premises, and would necessarily increase the value of the premises as licensed premises. Neither of these kinds of profit, or of the increased value the opportunity of earning them gives to the premises as licensed, are excluded from consideration when compensation is to be estimated, because by the loss of the licence the publican loses the benefit of both of them, but out of consideration for the publican this increased value given to the licensed premises, by reason of the realization of the second class of profit, is, in my view, to be left out of consideration in estimating both the monopoly value and the annual licence value.

This is, I think, the rational construction of the sub-section, and I have from the first been quite unable to understand why it should be deemed necessary to direct that the value which profits derived from the trade in non-intoxicants to the realization of which the existence of the licence contributes nothing, and which it in no way affects, should be left out of consideration in ascertaining either the monopoly value or the annual licence value. These profits are *ex hypothesi* not increased by the grant of the licence nor lessened by the loss of it. The power of earning them is not conferred by the licence, nor taken away when its renewal is refused. No direction was necessary for their exclusion because they were unconnected with the licence. The very nature of the problem to be solved by itself excluded them. In my opinion, therefore, as I have said, what is on the true construction of this sub-section to be excluded from consideration is that increase in the value of the premises as licensed compared with their value as unlicensed, which is due to the extra profits realized in a trade, other than the trade in intoxicants, owing to its being carried on in licensed premises. That extra value is due to the licence. It is an increased value, and but for this direction would, I think, be properly taken into account in fixing both the monopoly value and the annual licence value as it is taken into account in assessing compensation.

I express no opinion either on the correctness of the figures mentioned in the case or of the methods by which they have been ascertained.

The decision of the majority of the Court of Appeal was

therefore, in my opinion, erroneous, and should be overruled, and that of Hamilton J. restored, and this appeal be allowed.

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LORD PARKER OF WADDINGTON. My Lords, the substantial question on this appeal is the true construction of sub-s. 2 of s. 44 of the Finance (1909-10) Act, 1910, which I will call the Finance Act, 1910. The words of the sub-section are so familiar to your Lordships that I will not read it.

If attention be confined in the first instance to the words actually used, it appears to me that the words "no increased value" must mean "no increased annual value of the premises," and that the word "increased" most aptly refers to an increase over the annual value which the premises would bear if unlicensed, and therefore to an increase due to the licence.

The sub-section clearly assumes that the annual value of the premises as licensed premises, which I will call A, will exceed the annual value of the premises without the licence, which I will call B. These values are to be ascertained on the same basis as that on which compensation is calculated under s. 20 of the Licensing (Consolidation) Act, 1910 (formerly s. 2 of the Licensing Act, 1894).

On reference to s. 20 of the Licensing (Consolidation) Act, 1910, it will be found that the compensation referred to is measured by the amount which the value of the premises as licensed premises exceeds their value without the licence, and these values (which are capital and not annual values) are to be determined in the same manner as the value of an estate for the purposes of estate duty under s. 7 of the Finance Act, 1894. In other words these values are respectively the prices which the premises would fetch in the open market (1.) as licensed premises and (2.) as unlicensed premises. It follows that the annual values A and B to be ascertained for the purposes of s. 44, sub-s. 2, of the Finance Act, 1910, are respectively the rents which the premises would fetch in the open market (1.) as licensed premises and (2) as unlicensed premises. There is no difficulty as to B. It is simply a market rental value ascertained in the usual way without reference to any particular mode in which the premises are to be used, but with reference, of course,

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to all the various purposes for which the premises are available. A also is a market rental value, but in the case of A the premises are available for an additional purpose by reason of the licence. A, therefore, though it must include B, includes something more, and that something is the additional rental a tenant would give for the benefits conferred by the licence.

Now, the licence may confer a benefit in two ways. First, it may, and in ordinary course does, enable the tenant to make a profit by the sale of intoxicating liquor which he could not sell without a licence. This may be called the direct benefit of the licence. Secondly, it may enable the tenant to make more profit in other ways. This may be called the indirect benefit of the licence. In ascertaining compensation both these benefits must be taken into account, and the question is what additional capital sum a tenant would pay for them beyond the price which he would give for the premises without the licence. In the case, however, of the annual licence value, the clause which your Lordships are considering appears to preclude the second or indirect benefit from being taken into account. The only question, therefore, is what additional annual rental the tenant would pay for the first or direct benefit beyond the rent he would pay for the premises without the licence. By way of illustration, assume that he would be willing to pay by the year 100*l.* more for the first or direct benefit and 50*l.* more for the second or indirect benefit. Then, but for the clause in question, A would be equal to B + 150*l.*, but having regard to this clause, A would be equal to B + 100*l.* only. The 50*l.* is, in the words of the clause, the "increased annual value of the premises arising from profits not derived from the sale of intoxicating liquor." It is, therefore, to be excluded in calculating the annual value of the premises as licensed premises.

Not only does this seem the natural interpretation of the clause, but it is an interpretation which, so far as I can see, involves no hardship or anomaly, and it is an interpretation which, without hardship or anomaly, could be adopted in the case of the corresponding clause contained in s. 14 of the Licensing (Consolidation) Act, 1910, which relates to monopoly value.

It was said that both in the case of monopoly value under s. 14 of the last mentioned Act and annual licence value under s. 44, sub-s. 2, of the Finance Act, 1910, it is assumed that the annual value of the premises as licensed premises will be first ascertained, and that you will then proceed to ascertain the annual value of the premises without the licence, and deduct the latter value from the former. Even if this course be taken, the result will be the same, for, in order to ascertain B after having ascertained A, you will have to split up A into two factors, of which the first will represent the annual value of the premises due to the licence, and the second will represent the value of the premises without the licence. The actual amount of this latter factor is really of little importance in the ultimate result, for it is eliminated in the process of deducting B from A.

During the course of the argument and re-argument I entertained considerable doubt, indeed, I am still in doubt, whether this interpretation of s. 44, sub-s. 2, of the Finance Act, 1910, will in this particular case lead to the result contended for by the law officers or that contended for by Sir Alfred Cripps. It seems to me that there was some misconception underlying the contentions on either side. Both parties referred to the case of *Ashby's Cobham Brewery Co. and Ashby's Staines Brewery Co.* (1) I take that case to decide that for compensation purposes, in estimating the price which licensed premises would fetch in the open market, allowance must be made for the fact that brewers would be probable, if not the most probable, purchasers, and that to a brewer the premises might be more valuable than to a person unconnected with the brewing trade, because not only could he let the premises to a tenant, but by tying the premises to his brewery could derive profit from supplying such tenant with intoxicating liquor. Calculations were therefore allowed both as to the brewer's profit from supplying liquor to the tenant, and as to the tenant's profit from retailing the liquor so supplied, and, assuming the case was rightly decided, similar calculations may have to be made for the purpose of ascertaining annual licence value under s. 44, sub-s. 2, of the Finance Act, 1910.

But the case itself had nothing whatever to do with profits

(1) [1906] 2 K. B. 754.

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derived otherwise than by supplying or retailing intoxicating liquors. It did not, as the arguments of counsel on both sides seemed to suggest, either expressly or impliedly decide that for the purpose of ascertaining the value of licensed premises you must treat them as part of a going concern making ascertained profits, or that the true criterion of value was what a purchaser would give for this going concern. In calculating compensation it is the premises which are to be valued, and not the businesses carried on in the premises. The valuation is for the purpose of arriving at the amount of the compensation payable, and not for the purpose of ascertaining the loss in respect of which the compensation is provided. If for compensation purposes it is ever necessary to consider the actual or probable profits derived otherwise than by the sale of intoxicants, it can only be because this is one way of arriving at the increase in annual value indirectly due to the licence. For the purpose of annual licence value from which this increase is to be excluded, it is unnecessary to consider these profits at all.

On the interpretation which I think ought to be placed upon s. 44, sub-s. 2, of the Finance Act, 1910, the annual value which ought to be attributed to the premises the subject of this appeal as licensed premises should be a sum made up of (1.) 300*l.* (the value of the premises without a licence), a figure as to which there is no dispute, and (2.) the additional annual rent a tenant would give in the open market for the chance of making what profit he could by selling intoxicating liquor. The 300*l.* includes all value arising from profits not derived from the sale of intoxicating liquor which ought to be taken into account at all. The parties, however, agreed that it will be sufficient if a declaration be made as to the true construction of the Act. I should myself propose to declare that according to the true construction of s. 44, sub-s. 2, of the Finance Act, 1910, the annual value as licensed premises of the premises known as the "Eagle" is 300*l.*, with the addition of such further annual sum as a tenant would give in the open market for the chance of making profit from the sale therein of intoxicating liquor, but with no further addition in respect of increased annual value due to the licence. I am of opinion,

however, that the declaration proposed by the Lord Chancellor will have the same effect. H. L. (E.)

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Order of the Court of Appeal so far as complained of in this appeal reversed and order of the King's Bench Division restored, except as regards the costs thereby directed to be paid. Declare that on the true construction of sub-s. 2 of s. 44 of the Finance (1909-10) Act, 1910, the premises known as the "Eagle public-house," 217, Great College Street, N.W., in the county of London, fall within the words "hotels or other premises used for purposes other than the sale of intoxicating liquor"; and that the words "increased value" mean increased value due to the licence of the premises over their value as unlicensed premises and arising from profits not derived from the sale of intoxicating liquor. Each party to pay their own costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, July 7, 1913.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Goddard, Son & Holme.*

[HOUSE OF LORDS.]

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 July 18. TYZACK AND BRANFOOT STEAMSHIP }
 COMPANY, LIMITED } RESPONDENTS.

Ship—Affreightment—Bill of Lading—Exceptions—Condition exempting Ship from Responsibility for Obliteration or Absence of Marks—Liability for Unmarked Goods—Commixtio.

Bales of jute consigned to various consignees and specifically marked were shipped under bills of lading stating that the bales were received “marked and numbered as per margin,” that the number of packages signed for was to be binding on the shipowner unless error or fraud be proved, but that the ship was not to be liable for “obliteration or absence of marks.” On the discharge of the ship fourteen bales were missing and eleven bales, forming part of the cargo shipped at the port of loading, were not marked as labelled in the bills of lading and could not be identified as belonging to any particular consignment. All the consignees received their full consignments except four, who refused to accept any of the eleven bales. In an action for freight by the shipowner against one of the four consignees, who had received six bales less than his full consignment, the consignee counterclaimed for shortage. The shipowner was willing to account to the four consignees for the value of the fourteen missing bales in proportion to their respective shortages, but claimed that the eleven bales ought to be allocated amongst them in the like proportion :—

Held, that, as the shipowner had failed to deliver the full number of bales shipped, he was not entitled to claim that the non-delivery of any of the six bales was due to obliteration or absence of marks, and that he was liable for the full value of the six bales.

Spence v. Union Marine Insurance Co. (1868) L. R. 3 C. P. 427, distinguished.

Dictum of Lord Russell of Killowen in *Smurthwaite v. Hannay* [1894] A. C. 494, at p. 505, considered.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 19, reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord

* *Present*: VISCOUNT HALDANE L.C., EARL LOREBURN, LORD SHAW OF DUNFERMLINE, and LORD Moulton.

Dundas, Lord Guthrie, and Lord Salvesen) recalling an interlocutor of the sheriff-substitute of Forfarshire. (1)

The facts found by the Second Division were incorporated in the interlocutor under appeal, and under the Court of Session Act, 1825 (6 Geo. 4, c. 120), s. 40, these findings were binding on the House.

The following statement of the facts so found is taken from the judgment of the Lord Chancellor.

“The appellants, who are spinners and manufacturers in Dundee, were the indorsees of eleven bills of lading, representing eleven separate parcels of jute, amounting to 2476 bales. As regards nine of these parcels delivery was made in full, but in the case of the remaining two there was a shortage in delivery. The parcels as to which there was a shortage consisted of 246 bales which were shipped under a particular bill of lading, and of 254 bales which were shipped under another.

“The cargo was put on board the respondents’ steamer *Fulwell* at Calcutta in August, 1909. Bills of lading for 28,002 bales of jute were given by the master of the vessel, and were indorsed to thirty-seven different consignees.

“The *Fulwell* arrived at Dundee, which was the port of destination, in October, 1909, and the discharge of the cargo commenced. It was completed before the end of the month, when it was found that on the out-turn of the ship there were missing fourteen bales, and that there also remained in the harbour shed eleven bales, forming part of the vessel’s cargo, which none of the consignees would accept as shipped under their respective bills of lading. Besides the appellant there were three other consignees who would not accept delivery, and these claimed against the respondents for four, eight, and seven bales respectively. The appellants claimed for shortage of six bales, the total shortage claimed for being thus twenty-five bales. All the other consignees, being thirty-three out of the thirty-seven referred to, acknowledged receipt of the full quantities consigned to them.

“The two bills of lading, indorsed to the appellants, and over which the dispute has arisen, set forth that there had been shipped in good order and condition on board the respondents’

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steamer a specified-number of bales of jute 'being marked and numbered as per margin.' In both cases the markings in the margin were in the words 'J. P. S. Naraingunge, 1909-10, on end in red R. B.' The total number of bales specified in these two bills of lading was 500, but it is admitted that only 494 bales bearing the marks above mentioned were delivered to the appellants. The bills of lading contained two clauses which are material. Clause 4 declared that 'The number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shippers' marks to be delivered.' Clause 7 declared 'The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped,' &c.

"There having been, as above stated, a shortage in delivery at Dundee to the appellants of six bales, they refused to pay freight except on the footing of claiming to set off against the freight the value of the six bales not delivered to them. The respondents then raised an action in the Sheriff Court of Dundee, claiming 175*l.* 1*s.* 6*d.*, being the balance of freight due in respect of the appellants' total consignment. The claim for freight was admitted by the appellants, but they counterclaimed for 15*l.* 5*s.* 4*d.*, being the value of the six bales which had not been delivered. The respondents in their pleadings offered to pay to the appellants, and the other consignees, who complained of short delivery, the price of the missing fourteen bales already referred to, 'in such proportions as they may be found to be entitled to the same,' but they maintained that, as the four consignees were, as they alleged, bound to allocate among themselves the eleven bales left in the harbour shed, they could not ascertain what part, if any, of the price of the fourteen bales would fall to the appellants.

"The sheriff-substitute decided that the appellants were entitled to deduct the value of the six bales not delivered from the sum sued for, and assessed their value at 15*l.* 5*s.* 4*d.* The respondents appealed to the Court of Session and the Second Division heard the case. In the course of the argument before that Court the respondents expressed their willingness to give the appellants credit for a proportion of the value of the fourteen bales,

irrespective of whether they would come to an agreement as to the allocation of the eleven bales remaining in the harbour shed. H. L. (Sc.) 1913

“The Second Division reversed the decision of the sheriff-substitute. They held that the appellants were not entitled to any further deduction than the amount which the respondents were willing to concede, which amounted to 8*l.* 11*s.*, and they gave judgment for the difference. The sum in dispute is therefore only 6*l.* 14*s.* 4*d.* The question over which the controversy has taken place is, however, one of general importance.”

The following further findings of the Second Division were also referred to by the Lord Chancellor in his judgment or by counsel in argument: That the eleven unclaimed bales were not marked as described in the bills of lading presented by the appellants and the other three consignees above mentioned; that it was impossible to identify them as forming part of any of the parcels marked in the manner set forth in those bills of lading, but that there were marks on the ends of the bales which shewed that some of them could not have been marked “on end in red R. B.”; that the eleven bales were shipped in the condition in which they were delivered by one or more of the shippers of the consignments.

1913. June 19, 23. *Scott Dickson, D.F.*, and *Condie Sandeman, K.C.* (with them *Arthur R. Brown*) (all of the Scottish Bar), for the appellants. The respondents have contracted to deliver certain bales of goods to the appellants and they have not done so. The appellants are entitled to delivery in full of the goods shipped under the bills of lading indorsed to them. There is nothing to shew that the six bales in respect of which the appellants claim were included in the eleven left in the harbour shed; they may equally well have been included in the fourteen. The decision of the Second Division of the Court of Session is a travesty of common sense, and the fallacy which underlies that decision is that the Court treated the cargo as having been shipped by one shipper. This is not a question of the obliteration of the marks, but of the identity of the goods delivered with those shipped. In *Jessel v. Bath* (1), *Cox v. Bruce* (2), and

(1) (1867) L. R. 2 Ex. 267.

(2) (1886) 18 Q. B. D. 147.

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Parsons v. New Zealand Shipping Co. (1), to which Lord Salvesen refers, the identity of the goods was either admitted or proved. *Spence v. Union Marine Insurance Co.* (2) has no bearing on the present case. That was a claim under a marine insurance policy as for a total loss and the onus was on the plaintiff to establish the total loss. Here the onus is on the respondents to shew that the goods described in the bill of lading were not shipped and they have failed to discharge that onus. The principle of commixtio which was applied in the marine insurance case has no application to the present case because it is impossible to say who was originally the owner of any one of the eleven bales. *Smurthuwaite v. Hannay* (3) was primarily a decision upon practice, but it contains a dictum by Lord Russell of Killowen, who appears to have thought that the principle of *Spence v. Union Marine Insurance Co.* (2) was applicable to a claim for non-delivery. That dictum was not necessary for the decision of the case and, assuming that it applies to the present case, it is wrong and ought to be overruled. [They referred also to Bell's Principles, s. 1298, sub-s. 2, as to commixtio.]

R. S. Horne, K.C., and *Hon. William Watson* (both of the Scottish Bar), for the respondents. Under a bill of lading without conditions the shipowner is bound to deliver the goods as shipped and the onus is on him to prove that he received something different from that described in the bill of lading, but the exceptions in a bill of lading are introduced for the purpose of shifting that onus from the shipowner on to the shipper; and in this respect a consignee is in no better position than the shipper: *Cox v. Bruce* (4); *Jessel v. Bath* (5); *The Ida* (6); *Horsley v. Baxter Brothers & Co.* (7) Condition 7 of this bill of lading covers this case. The shipowner is not to be liable for the absence of the marks or for any of the consequences which flow from that absence. He does not admit that he is receiving goods marked in a particular way, but merely that he has received so many bales of jute. Suppose for the sake of argument one

(1) [1901] 1 K. B. 548.

(2) (1868) L. R. 3 C. P. 427.

(3) [1894] A. C. 494, at p. 505.

(4) 18 Q. B. D. 147.

(5) L. R. 2 Ex. 267.

(6) (1875) 32 L. T. 541.

(7) (1893) 20 R. 333.

consignee was getting the whole cargo he could not be allowed to say that these eleven bales were not his. It is found by the Court that the eleven bales were shipped in the condition in which they were delivered, that the ship delivered all the bales she got, and that all the consignees except four got their goods correctly. Upon these findings, having regard to the form of this bill of lading, the onus is on the shipper to shew that the bales were shipped as labelled in the bill of lading. If it is a question of identity, the shipowner is entitled to say that these are the identical goods which he received. The inevitable result is that these eleven bales must be divided proportionately amongst the four consignees who have failed to identify the whole of their consignments. Where it is impossible for any one of the consignees to prove affirmatively that his goods are not amongst this unclaimed lot he must accept his proportion of that lot, otherwise these eleven bales would be the goods of nobody, although it is found that they were shipped, and the shipowner would be liable in damages, notwithstanding the exception which says he is not to be responsible for confusion. In *Spence v. Union Marine Insurance Co.* (1) and *Smurthwaite v. Hannay* (2) the Court was faced with the same problem. *Smurthwaite v. Hannay* (2) was precisely this case, although it was decided on a point of procedure. In that case there were fifteen bales short and eighteen bales which were unidentifiable and there were several shippers. Lord Russell of Killowen was of opinion that the principle of *Spence v. Union Marine Insurance Co.* (1) applied to a claim for short delivery and that the shipowner would have been entitled to say to the shippers who had not received their full consignments that their bales were amongst the eighteen bales which were incapable of identification, notwithstanding that there was a shortage of fifteen bales, and that they became in point of law tenants in common of those eighteen bales in proportion to their several interests. In both these cases the bales which are lost and those which are not identifiable are dealt with on the same footing.

Scott Dickson, D.F., replied.

The House took time for consideration.

(1) L. R. 3 C. P. 427.

(2) [1894] A. C. 494.

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H. L. (SC.) July 18. VISCOUNT HALDANE L.C. My Lords, in this appeal
1913 the House can deal with the questions of law that arise only on
SANDEMAN & SONS v. TYZACK AND BRANFOOT STEAMSHIP COMPANY, LIMITED. the footing that the facts have been conclusively found by the
Court below. But I think that the facts have been so fully found
that we are in a position to dispose of the case without difficulty.
The substance of what has been so found is shortly as follows.
[His Lordship stated the facts as above.]

My Lords, it is, in the view which I take of this case, important to define what was the nature of the claim made on each side. The respondents were suing for freight, and they had to shew that they had performed their contract. That contract was to carry and deliver, or tender, at Dundee the bales put on board at Calcutta. Unless they fulfilled this contract they were not entitled to freight on any bales in respect of which they had not fulfilled it.

The appellants, on the other hand, were entitled to have the bales put on board delivered to them as put on board, unless the special stipulations in the bills of lading protected the respondents. As the bales in question had been signed for and no error or fraud was shewn within the meaning of clause 4, to which I have referred before, the respondents could not say that the whole twenty-five bales had not been shipped. Nor does clause 7 help them. For it can apply only if the goods are proved to have been delivered. If a number of packages were shipped, and that number was delivered to a single consignee, the shipowners, who would have satisfied clause 4 by delivering the proper number, might be protected from inaccuracy or obliteration of marks by clause 7. In the case before the House the Court below has found as a fact that there were eleven bales not marked as described in the bills of lading and that it is impossible to identify these bales as forming part of any parcels marked as set forth in the bills of lading, and that there are marks on the ends of these bales which shewed that some of them could not have been marked "On end in red R. B."

Now fourteen bales have been lost altogether, and there are four consignees to whom the respondents seek to attribute the eleven bales. Why, then, should the appellants be bound to treat their six bales as included in the eleven which have arrived

rather than in the fourteen which did not arrive? My Lords, it appears to me that a fallacy underlies the reasoning of Mr. Horne in the able argument he addressed to us on behalf of the respondents. He assumed that the six bales missing could be identified as forming part of the eleven which arrived. But they may have been among the fourteen which did not arrive. Your Lordships will observe that this being an action for freight, the respondents have to prove that they duly tendered the goods shipped at the termination of the voyage. But this is just what they cannot do. It follows, not only that they must fail in their action for freight in respect of the six bales, but that the appellants are entitled to say to them that, having failed to prove their delivery, a counter-claim lies for the value of the goods shewn to have been shipped but not delivered.

The learned counsel for the respondents relied on the case of *Spence v. Union Marine Insurance Co.* (1), where part of a cargo of cotton arrived at Liverpool but could not be identified, and it was held that the property in the part of the cargo which arrived, but of which the marks had been obliterated, had not ceased to belong to the consignees, and that the various consignees had become tenants in common of the mass of cotton according to their respective interests. But that was a case of a claim against an insurance company as for a total loss, and the consignee who claimed in the action had to establish his total loss. He failed for obvious reasons. It is sufficient to say that such a claim presents no real analogy to that which is before us. In *Smurthwaite v. Hannay* (2), which was an action for non-delivery like the present, there is a dictum in the judgment of Lord Russell of Killowen which suggests that the doctrine applied in *Spence v. Union Marine Insurance Co.* (1) might be applied in a case resembling the present. But that dictum was unnecessary for the decision of the appeal, which turned on a point of procedure only, and the other noble and learned Lords who were parties to the judgment did not express concurrence in it.

For the reasons I have given, I am of opinion that the judgment of the Second Division must be reversed, and that the

(1) L. R. 3 C. P. 427.

(2) [1894] A. C. 494, at p. 505.

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H. L. (Sc.) decision of the sheriff-substitute must be restored, with costs in this House and in the Courts below.

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EARL LOREBURN. My Lords, the able arguments to which we have listened help to reduce within a narrow compass all the material points in this case. This ship received at Calcutta, and gave bills of lading, of which the appellants are indorsees, for 2476 bales of jute. When she arrived at Dundee she delivered only 2470 bales, and the question is whether or not there is a valid claim by the indorsees for the balance of six bales undelivered.

Now, the answer rests entirely upon the seventh condition or exception in the bill of lading. It is found, as a fact, that a great many other bales of jute were shipped in this vessel. On arrival all was in order except that fourteen bales out of the total shipped, in some unexplained way, were not forthcoming at all, and eleven bales could not be identified as belonging to any consignee, by reason of defective or obliterated marking. Upon this, the shipowners admitted their responsibility to make good the shortage of fourteen bales, but say that they are not liable at all in respect of the eleven bales, because the seventh exception relieves them. Their contention is that all the consignees of any jute in this cargo to whom short delivery was made must be settled with upon the basis that the fourteen lost bales belonged to them in proportion to their shortage, and that the eleven unidentifiable bales also belonged to them in the same proportion.

The seventh exception runs as follows: "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration, or absence of marks, numbers, or description of goods shipped" The owners bind themselves to deliver the goods subject to the exceptions and conditions. In my opinion, each bill of lading evidenced or constituted a separate contract, by which the owners were bound to deliver the selfsame bales that they received, but would be excused from delivery if it was made impossible by obliteration or absence of marks on these particular bales.

Suppose that in this very case all the bales stowed in the

ship at Calcutta had been forthcoming at Dundee, but that eleven of them had been found not capable of identification owing to obliteration or absence of marks, so that no one could say to which bill of lading they belonged, there would have been no difficulty. All the bales incapable of identification in that case clearly belonged to one or more of the disappointed consignees in definite proportion to the shortage of which each complained, but which particular bale belonged to which particular consignee could not be proved. All the disappointed consignees were in that case disappointed because of absence or obliteration of marks on their own bales as well as upon the bales of the others complaining of shortage. And the shipowners could have said, "Our contract to deliver was conditional; the condition which excused us from delivering has arisen. The facts shew that every single bale that each one of you shipped is on board, though its identity cannot be made out because of its defect in marking, for which we are not liable."

But on the facts found in the case now before your Lordships no such protection is available to the shipowners, and for this simple reason. Apart from the eleven unidentifiable bales there were fourteen missing bales. It may be that the six which the appellants complain have not been delivered to them were among these fourteen. So the shipowners cannot prove, at least they have not proved, that the failure to deliver these six was due to any absence or obliteration of marking of such six bales. Clearly the burden of proving that the case comes within the exception lies upon the shipowners who set it up. They have failed in the proof, and stand in the position of men who contracted to deliver merchandise admittedly stowed in their vessel and have been unable to establish an excuse, however probable it may be that such an excuse really exists if the whole truth could be known.

I do not say anything in regard to the argument as to commixtio, because it seems to me quite beside the facts of this case. Owners of goods which have become so mixed as to be inseparable have rights among themselves, but those rights cannot override their contractual relations with other persons. I think this appeal should be allowed.

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H. L. (SC.) LORD SHAW OF DUNFERMLINE. (1) My Lords, by the two bills of lading founded on, the respondents stood charged with the receipt at Calcutta of 500 bales of jute, and they became responsible for the delivery of the same number to the defenders at Dundee. 1913
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 TYZACK AND They have only, however, delivered 494. Unless excused by the conditions of or exceptions in the contract they are liable in respect of the short delivery of six bales.
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The defenders' goods had been shipped along with many other consignments of jute also destined for Dundee. Delivery of the cargo was made on the wharf en masse. In the reckoning eleven bales could not be identified, other fourteen had disappeared. Four merchants had short delivery,—one of these the defenders' firm, to the extent of six bales. These bales have not been identified with any of the eleven whose marks have gone; on the contrary, Lord Salvesen does not doubt that the quality of the jute in the unmarked bales did not correspond with any of the consignments upon which there had been a shortage. The truth accordingly is, (1.) that the respondents became charged with delivery of six bales, (2.) that they have failed to deliver, (3.) that no clause as to obliteration of marks applies to this case because the obliteration occurs on parcels of another quality of goods, and (4.) that the failure either to deliver or to identify is thus complete.

On these facts I am of opinion that no case arises for the extrication of the rights of parties by applying any rule of distribution amongst co-owners. For the defenders are not co-owners with others of the remnant of this cargo. Their goods are not in it; and no principle of distribution, confusion, commixtio, or right in common, can apply to the case of a merchant whose goods have disappeared, and who is asked to accept in lieu of them, and in satisfaction pro tanto of his contract rights, a distributive share in something else no part of which ever belonged to him. I cannot read the opinion of Lord Russell in the case of *Smurthwaite* (2) as justifying any such proceeding. If it did, as was argued, I should respectfully disagree with an opinion to that effect.

The respondents have unfortunately to face the total

(1) Read by Lord Parker of Waddington.

(2) [1894] A. C. 494.

disappearance of fourteen bales. The defenders' six may all be among them. Had the shipowners delivered the cargo in full, and had the qualities not been so disconform to those of the goods shipped, they might well have argued with force that all the shippers of goods (and all of them parties to bills of lading in similar terms) stood together to take the risk of confusion by the loss of identifying marks. But the cardinal fact of delivery fails, and with it awanting, the doctrine of distribution goes.

Having reached this point I need go no further. For the reasoning and the language of Lord Loreburn are such that I could not presume to add to them, and I venture to adopt in its entirety the judgment of the noble and learned Earl.

LORD MOULTON. (1) My Lords, in this case the pursuers, the present respondents, have brought an action against the appellants to recover freight upon 2476 bales of jute delivered to them at Calcutta, to be conveyed on the steamer *Fulwell* to the port of Dundee under the terms of certain bills of lading, eleven in number. The defenders admit the contracts, but allege that the pursuers have failed to perform two of them, in that of the 500 bales specified in those two bills of lading only 494 bales were delivered to them at the end of the voyage. They claim accordingly that the pursuers have not earned the freight on the six bales short-delivered; and further, that they are entitled to set against the freight of the bales actually carried and delivered to them the value of the bales short-delivered.

The case was originally heard in the Sheriff Court at Dundee. At the hearing the sheriff-substitute found in favour of the contentions of the defenders, and assessed the value of the bales short-delivered at 15*l.* 5*s.* 4*d.*, which was the value claimed by the defenders in their pleadings, and on the basis of which they had made a proper tender for the sum due to the pursuers in respect of freight. Upon certain grounds presently to be noticed, the pursuers in their pleadings expressed a willingness to allow to the defenders a credit of 8*l.* 11*s.*, and no more, against the full freight due. The difference between these two sums, namely, 6*l.* 14*s.* 4*d.*, was therefore the amount which was

(1) Read by Lord Parker of Waddington.

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really in issue between the parties. The sheriff-substitute found in favour of the appellants in respect of such sum, but on appeal his decision was reversed by the Second Division of the Court of Session, and it is from their interlocutor that the present appeal is brought.

To appreciate the point in dispute (which is one of considerable commercial importance), it is necessary to state a few facts. The ship *Fulwell* carried on this occasion a general cargo of jute, shipped under a number of separate bills of lading. Of this cargo the defenders' shipped eleven parcels, the numbers and marks on which were duly recorded in the margins of the respective bills of lading. The goods shipped under nine of these bills of lading were duly delivered, but of the goods shipped under the remaining two there was a shortage of six bales. It appears from the evidence that three other consignees also complained of short delivery to the extent of four, eight, and seven bales respectively, and the pursuers do not contest the allegation that the number of bales delivered to these consignees fell short of the number specified in the respective bills of lading by these amounts. On the other hand, upon the discharge of the ship eleven bales were found which corresponded to none of the bills of lading. The goods shipped by the defenders under the bills of lading in question purported to be of at least two different qualities, and the eleven bales found on the ship did not correspond in quality with any portion of those goods, and, in short, there is no evidence whatever to shew that any of the eleven bales formed part of the parcels shipped by the defenders under the two bills of lading under which there was short delivery.

It will be seen, therefore, that inasmuch as there is no question that the pursuers are bound by the statements as to numbers in the bills of lading signed by the master, they are in the position of having to admit that fourteen bales were lost, and that none of the eleven bales remaining over can be identified by them as forming part of the goods shipped under the two bills of lading which formed the contracts under which they are suing the defenders. The pursuers are, therefore, in the position of being unable to assert that they have delivered to the defenders

the goods which they received on their account for carriage. Prima facie this is a condition of their right to demand the payment of freight. It remains, therefore, to consider how they excuse themselves from proving the performance of that condition.

In the first place, they set up that the bill of lading is not an absolute contract to deliver, but a contract subject to conditions, and they contend that those conditions provide them with the requisite excuse. The two conditions to which they refer are numbered 5 and 7 in the bill of lading. No. 5 reads thus:

“Weight, measure, quality, contents, and value unknown.”

I entirely fail to see what application this has to the circumstances of the present case. It in no wise affects the obligation of the shipowner to deliver the identical goods entrusted to him for transport. Its plain object and effect is to guard him from being supposed to warrant the accuracy of the representations as to weight, measure, quality, contents, and value that may be found in the description of the goods or their markings as appearing in the bill of lading, and to let it be known that these appear in the bill of lading only as representations made to the master on behalf of the shipper, for the accuracy of which he is in no wise responsible. It is in strong contrast with No. 4, which provides that:—

“The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved.”

Condition No. 7 (so far as material) reads as follows:

“The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliteration, or absence of marks, numbers or description of goods shipped, leakage, breakage, loss, or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage.”

Here again there is no qualification of the absolute obligation to deliver the identical goods consigned to the shipowner for transport. It merely provides that if those goods should be injured in certain ways (one of which is the obliteration of marks), or should have been accepted by the ship without being marked in the way described in the bill of lading, the shipowner shall

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not be liable for their having been so injured or for their not corresponding to the marking described in the bill of lading. Considering that bills of lading pass into other hands, such a provision is an important protection to the shipowner. The presence of a mark indicating that the goods are the manufacture of some firm of high repute, or otherwise take high rank in the market by reason of their origin, may greatly influence their value, and but for the presence of such a provision in the bill of lading a shipowner might be involved in liability if the goods on delivery were found to be without the marking stated in the bill of lading. I can see no ground for attributing to condition No. 7 any other or different effect to this, which is the plain meaning of its words. But for the purposes of this case it suffices to point out that it cannot possibly qualify the obligation to deliver the identical goods consigned for shipment, nor can it refer to the absence or obliteration of marks on any goods other than those to which the bill of lading refers.

But although these points were made the subject of argument on behalf of the respondents, they do not represent the contention upon which they principally relied, and which was the ground of the decision in their favour by the Second Division of the Court of Session. Their main defence was an alleged principle of our law to the effect that, in such a case as the present, where there is a residue of unidentified goods and a shortage in delivery, the shipowner can compel the consignees to take the unidentified goods as a pro tanto fulfilment of the contract to deliver. To prove the existence of such a principle they cited the decision of the Court of Common Pleas in *Spence v. Union Marine Insurance Co.* (1) and certain expressions appearing in the opinion of Lord Russell of Killowen in the case of *Smurthwaite v. Hannay* (2) in this House. These cases I shall presently examine, but I think it convenient in the first place to submit to an independent examination the doctrines of our law in cases where goods belonging to different owners have become mixed, so as to be incapable either of being distinguished or separated.

My Lords, if we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal

(1) L. R. 3 C. P. 427.

(2) [1894] A. C. 494.

consequences of the goods of "A." becoming indistinguishably and inseparably mixed with the goods of "B." If the mixing has arisen from the fault of "B.," "A." can claim the goods. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of "B." that possession necessarily implies the possession of the intruding goods of "B.," he is entitled to it (2 Kent's Commentaries, 10th ed., 465). But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that "A." and "B." become owners in common of the mixed property.

Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shewn by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental commixtio. Blackburn J. in *Buckley v. Gross* (1) (following Kent's Commentaries) considers that they would be tenants in common in equal shares. In *Spence v. Union Marine Insurance Co.* (2) they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the Courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases where they would lead to substantial injustice. For instance, if a small portion of the goods of "B." became mixed with the goods of "A." by a negligent act for which "A." alone was liable, I think it quite possible that the law would prefer to view it as a conversion by "A." of this small amount of "B.'s" goods rather than do the substantial injustice of treating "B." as the owner of the whole of the mixed mass.

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(1) (1863) 3 B. &amp; S. 566, at p. 575.

(2) L. R. 3 C. P. 427.



H. L. (SC.)      It is from these propositions of law that the pursuers in this case attempt to spell out a right to compel the defenders to accept a proportion of the unidentified bales as a good delivery under the bills of lading. My Lords, there are, to my mind, two fatal objections to this—the one of fact and the other of law. In the first place, before any such principles can be applied it is necessary that it should be proved or admitted that the goods of the owners in question have in fact contributed to form the mixed mass. If the goods of “A.” and “B.” have become mixed, and it is possible, but not proved or admitted, that some of “C.’s” goods are in the mixture, there cannot possibly be a presumption of law that they are or are not to be found there, and accordingly “C.” cannot be compelled to take up the position of being a co-owner with “A.” and “B.,” nor is he entitled to insist on being regarded as such co-owner if “A.” or “B.” objects thereto. Whether his goods are to be found therein is a question of fact, which must be proved by the party asserting it. Now, in the present case there is not the slightest proof that any of the goods shipped under the bills of lading issued to the defenders are to be found in the unidentifiable bales. Everything, indeed, points the other way, because they are of a wholly different quality to any of the jute purported to be shipped by the defenders. But it is not necessary to discuss this question, or to do more than say that it is admitted that fourteen bales must be taken to have been lost, and there is no evidence, and there can be no presumption of fact, that the six bales belonging to the defenders were not among these missing bales. It follows, therefore, that, accepting to the full the above doctrines as to the effect of a confusion of goods, they afford no ground for requiring the defenders to accept the position of co-owners of the unidentifiable bales.

But, my Lords, there is, in my opinion, an objection of law which is equally serious. The doctrines to which I have referred deal with property, and not with contract. To illustrate my meaning, let me take a case where the circumstances are such as would justify in the strongest manner the application of these doctrines in the case of goods shipped under bills of lading. Let me assume that “A.” and “B.” were the owners of two separate parcels of cargo which have become inseparably and indistinguishably mixed, without loss and without deterioration.

It may well be that they could assert the position of joint owners in the mixed cargo, and as such take action against any person who sought to get possession of it or convert it to his own use. But it does not follow that the shipowners would have performed their contract of carriage. Their duty is to deliver the goods entrusted to them for carriage, and they do not perform that duty if all that the consignee obtains is a right to claim as tenant in common a mixture of those goods with the goods of other people. No doubt, if such a right is of some value, and the consignee avails himself of it, the shipowners are entitled to the benefit of what he receives in reduction of damages for their breach of contract, just in the same way as they would be entitled to credit for whatever value the goods possessed if they were delivered mixed up with some extraneous substance which lessened their value or compelled the consignee to go to expense in separating it out. In the present instance, therefore, the defenders were, under the bills of lading, entitled to the delivery of their goods, and even if the pursuers could compel them to take up the position of co-owners of the mixed mass, it would not be a defence to their claim for breach of contract to deliver, nor would it affect the damages recoverable thereunder, except so far as they had received or could receive payment representing the value of that co-ownership. The pursuers would have no right to claim that the right of the shippers to the proceeds of the goods as co-owners was a fulfilment of their own contract of carriage. They could only claim that any payment so received or receivable would be pro tanto a reduction of their liability in damages by reason of the defenders having received or being in a position to receive payment to that extent, so that the damages which they would suffer from the breach of contract would be diminished by a like amount. In the present case the defenders have received no payment of this kind, and for all that appears in the case the unidentifiable bales may possess no appreciable value, so that (apart from all other grounds) the pursuers are not on this account in a position to claim any reduction of the damages *prima facie* due from them to the defenders for their breach of contract to deliver.

The nature and consequences of the contention of the pursuers are well illustrated by considering the manner in which they

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have arrived at the sum of 8*l.* 11*s.* for which they express their willingness to credit the defenders. The number of bales short-delivered was twenty-five, of which fourteen are admitted to have been lost. The value of the six bales short-delivered to the defenders is fixed at 15*l.* 5*s.* 4*d.*, and 8*l.* 11*s.* is arrived at by taking fourteen twenty-fifths of that sum. The pursuers therefore contend that they have specifically performed their contract with respect to the remaining eleven twenty-fifths of the missing six bales (i.e., two and sixteen twenty-fifth bales) by telling the defenders to take their share of eleven unclaimed bales which are not shewn to be identical with or to correspond in any particular with the bales which they undertook to deliver.

I now turn to the decisions which it is contended establish doctrines inconsistent with the above conclusions. The chief, and in fact the only decision to which we are referred, is that of *Spence v. Union Marine Insurance Co.* (1) The facts of that case were as follows: Cotton belonging to different owners was shipped for Liverpool in bales specifically marked. On her voyage the ship was wrecked, all the cotton was more or less damaged, some of it was lost, and some was so damaged that it had to be sold at an intermediate port. The rest was sent on to Liverpool. By reason of the ship being wrecked the marks on all but a portion of that sent on to Liverpool were obliterated. The plaintiff was the holder of a bill of lading for forty-three bales, and of these two only were identifiable at Liverpool, and were duly received by him. He had insured the whole parcel, and the action was an action by him against the underwriters, as for a total loss of the forty-one bales. I should add that the unidentifiable portion of the cargo had all been sold (under an arrangement whereby the sale was to be without prejudice to the rights of the parties), and the proceeds divided among the owners who had not received their goods, in proportion to the number of bales short-delivered.

In these facts there are three matters worthy of special notice. In the first place, it was not disputed that all the goods had been duly shipped, and that the loss had been occasioned entirely by the ship being wrecked. In the second place, the goods appear to have been all of the same character, so

(1) L. R. 3 C. P. 427.

that it was only a question of the number of bales belonging to each particular owner. In the third place, the action was one of insurance, and the sole question was whether the plaintiff was entitled to say that there had been a total loss of the forty-one missing bales. There was no question of breach of contract to deliver. It was, therefore, open to the Court to regard the case as one in which, by reason of the perils of the sea and from no other cause, it came about, first, that the goods became indistinguishably mixed, and, secondly, that a portion of this mixed mass was lost. Under those circumstances the owners of the goods were clearly entitled to take up the position of having become co-owners of the mixed mass, and of every part of it, and therefore of the surviving portion of it, and seeing that the goods were all of the same quality, this was the only position they could take up in fairness to the underwriters. Everything had been done consistently with this view, and all that the Court decided was that this was the proper view to take of the matter; and if the judgment be carefully read, it will, in my opinion, appear that the Court arrived at its decision from the considerations that I have enumerated above, and did not purport or intend to make any addition to the law as to the effect of commixtio as previously enunciated by recognized authority.

The case of *Smurthwaite v. Hannay* (1) is of a different character. In that case bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, and upon arrival it was found that the number of bales landed fell short of those shipped, and that the marks upon some of the bales so landed had become obliterated, so that identification was impossible. These latter bales were sold and their proceeds distributed proportionately among the several consignees who had received short delivery. It would seem that all the bales were treated as being similar. Under these circumstances sixteen holders of bills of lading joined in one action against the shipowners, claiming damages for non-delivery of the specified number of bales. The defendants applied to stay the action on the ground that neither Order xvi., r. 1, nor Order xviii., r. 1, justified the joinder of such causes of

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action. The sole question before the Court, therefore, was as to the construction of these rules. The Court of Appeal had decided in favour of the plaintiffs, and from that judgment the defendants appealed to this House. In the result the appeal was allowed, and it was decided that on the true construction of the rules in question the various holders of the bills of lading could not combine as co-plaintiffs in one and the same action.

In the course of the argument counsel for the appellants suggested that unless holders of bills of lading could thus join in one action, they would be placed in a position of some difficulty, because the defendants might attribute a sufficient number of the unmarked bales to the particular plaintiff suing, and so meet his claim. I have some difficulty in appreciating the legitimacy of such an argument, when the sole point before the Court was as to the construction of the language of certain rules. There is certainly no presumption that such rules are sufficient to prevent difficulties arising in practice, and it is evident that Lord Russell did not base his opinion on any such ground, for he says: "The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has in the facts of this case much weight, but whether it has or has not, it cannot be regarded, if, as I think, the Orders and Rules do not authorize that joinder of plaintiffs which has here been attempted."

Nevertheless, it is true that he does say in his judgment that the difficulty suggested by the plaintiffs is not a real one, because the defendants could only attribute to each single owner of a bill of lading a proportion of the unidentified bales in answer to their claim for non-delivery. Under the circumstances of the case this could be nothing other than an obiter dictum. It was doubtless justified in that particular case by the fact that it was common ground that all the bales were similar, and that the parties had been acting on the basis of their being owners in common of the unidentifiable bales, seeing that the proceeds of the sale of those bales had been divided amongst them proportionately. Under these circumstances no objection could be made to the statement that they were owners of the unidentifiable bales in proportion to their respective interests. But if the

noble and learned Lord intended to go further than the circumstances of that case, and to say that a tender of a proportion of unidentifiable bales is to the extent of that number of bales an answer to a claim of the holder of a bill of lading for short delivery, I am of opinion that the dictum was erroneous and cannot be justified. But I see no reason for thinking that his Lordship intended to lay down any such principle, or that he had before his mind the general case of short delivery under bills of lading.

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For these reasons I am of opinion that this appeal ought to be allowed.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Sheriff-substitute restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 18, 1913.

Agents for appellants: Linklater, Addison & Brown, for Johnstone, Simpson & Thomson, Solicitors, Dundee, and Elder & Aikman, W.S., Edinburgh.

Agents for respondents: Beveridge, Greig & Co., for J. & H. Pattullo & Donald, Solicitors, Dundee, and Alex. Morison & Co., W.S., Edinburgh.

[HOUSE OF LORDS.]

H. L. (E.)*	TOTTENHAM URBAN DISTRICT COUNCIL	APPELLANTS ;
1913		AND
July 24.	METROPOLITAN ELECTRIC TRAMWAYS, } LIMITED }	RESPONDENTS.

Rates—General District Rate—Assessment—Tramway—“Land used only as a railway”—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b).

A company were the occupiers of, and worked as one connected system, a tramway and a light railway, which were constructed in and along certain public streets and roads in the district of an urban council. The tramway was constructed under various local tramway Acts and Orders, and the light railway under Orders made under the Light Railways Act, 1896. The tramway and the light railway had a junction with each other and were worked by electricity on the overhead system. They were identical as to mode of construction and materials used, and the rails of each were laid level with the surface of the highway; the same carriages were used upon them and ran through the one on to the other, and the electrical energy used for working both the tramway and the light railway was generated at the same power station and thence transmitted over a common system of cables and mains to sub-stations:—

Held, that the tramway was not a railway within the meaning of s. 211, sub-s. 1 (b), of the Public Health Act, 1875, and that the company were therefore not entitled in respect of their tramway to be assessed to the general district rate at one fourth only of its net annual value.

Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority [1892] 1 Q. B. 357, followed.

Decision of the Court of Appeal [1912] 2 K. B. 216, reversed.

APPEAL from an order of the Court of Appeal reversing an order of a Divisional Court upon a case stated by justices. (1)

The question raised by this appeal was whether upon the facts hereinafter stated the respondents, as occupiers of certain lines of rails of tramways within the appellants' district, were entitled under the provisions of s. 211, sub-s. 1 (b), of the Public Health Act, 1875 (2), to be assessed to the general district rate of the district

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1912] 2 K. B. 216.

(2) Public Health Act, 1875, s. 211: “With respect to the assessment and levying of general

district rates under this Act the following provisions shall have effect; (namely.)

“(1.) General district rates shall

in respect of the said lines in the proportion of one fourth part only of the net annual value thereof. H. L. (E.)

By a general district rate made by the appellants on April 1, 1910, under the Public Health Act, 1875, upon all property in the urban district of Tottenham the respondents were rated as occupiers of the said tramway lines and were assessed on the full net annual value thereof, and the sum of 495*l.* 12*s.* 6*d.* was demanded as the rate payable in respect of that value. The respondents paid to the appellants in respect of this rate the sum of 123*l.* 18*s.* 2*d.*, being the total sum charged by the rate calculated on one fourth part only of the net annual value.

At the petty sessions holden at Tottenham, on the hearing of a complaint preferred by the appellants against the respondents charging them with refusing to pay the sum of 371*l.* 14*s.* 4*d.*, the residue of the rate, the justices ordered the respondents to pay that sum to the appellants, but, on the application of the respondents, stated a case for the opinion of the High Court.

The respondents were the occupiers and worked as one connected system certain tramways and light railways constructed in and along certain public streets and roads in the counties of Middlesex, London, and Hertford.

These tramways and light railways were constructed and worked under the powers and subject to the provisions of the following Acts and Orders or some of them. As to the tramways: the North London Suburban Tramways Order, 1879 (confirmed

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be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property . . . subject to the following exceptions regulations and conditions; (namely,)

“(b) The owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable

meadow or pasture ground only, or as woodlands market gardens or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof:

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by the Tramways Orders Confirmation Act, 1879); the North London Tramways Act, 1882; the North Metropolitan Tramways Acts, 1892, 1897, and 1902; the Tottenham Improvement Act, 1904; the Metropolitan Electric Tramways Act, 1908. As to the light railways: the County of Middlesex Light Railways Orders, 1901 and 1903, both made and confirmed under the Light Railways Act, 1896.

Certain portions of the tramways and light railways constructed and worked under the Acts and Orders above mentioned or some of them (hereinafter called respectively "the tramway" and "the light railway") were situate within the appellants' district.

The tramway and the light railway, in accordance with the provisions of the County of Middlesex Light Railways Order, 1901, had a junction with each other and also had junctions with other of the tramways and railways aforesaid outside the district, and all of them were worked by the respondents as one connected system as aforesaid.

The tramway and the light railway as to mode of construction and the materials used therein were identical and consisted of lines of iron or steel grooved or slotted rails with the uppermost surface thereof level with the surface of the highway, and overhead wires suspended from posts placed alongside of or in the middle of the streets conveyed the electric power required for moving the carriages thereon. The carriages used upon the tramway and light railway were the same carriages and had flanged wheels running on the rails, and the same carriages used on the tramway ran through and over the light railway for the conveyance of passengers and parcels thereon as part of one common system. The charges authorized by the Acts and Orders aforesaid or some of them were also applicable to both the tramway and light railway. The same carriages were moved along the rails both of the tramway and the light railway by electrical power on what is commonly called the overhead system as above mentioned.

The electrical energy used for working the tramway and the light railway as aforesaid was generated at the same power station and was thence transmitted over a common system of

cables and mains to sub-stations. The tramway and the light railway both took the power required by them in common either from the main station or from the sub-stations.

Pursuant to the powers of the Metropolitan Electric Tramways Act, 1908, the respondents appointed stages upon the tramway and light railway or portions thereof as part of the whole system aforesaid and as one undertaking and carried both passengers and parcels over fixed through routes, some of which were partly upon the tramway and partly upon the light railway, at through fares and charges.

The lines of rails and the land occupied thereby forming the tramway, together with the overhead wires and the posts from which they were suspended, were the premises assessed in the said rate and were used only in the same manner as the light railway was used for public conveyance.

Prior to the year 1904 the respondents in respect of the tramway were assessed by the appellants to the general district rate of the district as a railway was assessed under s. 211 of the Public Health Act, 1875, namely, in the proportion of one fourth part only of the net annual value thereof.

The respondents in respect of the lines of rails and the land occupied thereby forming the light railway were assessed by the appellants to the general district rate of the district in the proportion of one fourth part only of the net annual value thereof, and no question was raised by either of the parties in relation thereto.

The justices were of opinion that the case was governed by *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* (1) and that the tramway was not a railway within s. 211 of the Public Health Act, 1875, and they therefore ordered the respondents to pay the balance of the rate.

The Divisional Court (Lord Alverstone C.J. and Darling and Bankes JJ.) affirmed the decision of the justices upon the same ground.

The Court of Appeal (Farwell and Kennedy L.JJ. and Warrington J.), overruling *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* (1) as being inconsistent

(1) [1892] 1 Q. B. 357.

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H. L. (E.) with *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban District Council* (1), reversed the decision of the Divisional Court and ordered the rate made on April 1, 1910, to be rescinded.

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1913. June 20, 23, 24, 26. *Macmorran, K.C.*, and *Ryde, K.C.* (with them *Cartwright Sharp*), for the appellants. A tramway constructed as a tramway under local Acts incorporating the Tramways Act, 1870, is not for purposes of rating a railway within the meaning of s. 211 of the Public Health Act, 1875: *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* (2), adopted by A. L. Smith L.J. in *Williams v. London and North Western Ry. Co.* (3), which was a decision upon a similar provision in a local Act. In the Court below reliance was placed by the respondents upon the definition of a railway given by A. L. Smith L.J. in his judgment as being "a line of rails, connecting one place with another, over which goods and passengers are carried," and it was said that that was wide enough to include a tramway; but, having regard to the rest of the judgment, that is not a fair construction of his language. In the Public Health Act, 1875, s. 147, the terms "railway" and "tramway" are used in juxtaposition, thus shewing that the Legislature recognized the distinction between the two terms. *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban District Council* (1), upon which the judgment of the Court of Appeal was founded, is distinguishable. The structure described in the private Act in that case as a tramroad was physically a railway. It was on raised rails laid on sleepers and it was constructed on private land fenced off from the adjoining land except where it crossed public streets by means of level crossings; it would be described in ordinary parlance as a railway. *Wakefield and District Light Ry. Co. v. Wakefield Corporation* (4) is also distinguishable because, although the railway in that case physically resembled a tramway, it was constructed under the Light Railways Act, 1896. That case decided first, upon the construction of s. 12, sub-s. 2, of that Act, that s. 211, sub-s. 1 (b), of the Public Health Act, 1875, applied to light railways, and,

(1) [1907] 1 K. B. 568; [1909] A. C. 264.

(3) [1900] 1 Q. B. 760.

(4) [1907] 2 K. B. 256; [1908] A. C. 293.

(2) [1892] 1 Q. B. 357.

secondly, following *Pimlico, Peckham and Greenwich Tramway Co. v. Greenwich Union* (1), that, notwithstanding the public user of the streets, the company were occupiers of land used only as a railway within the meaning of s. 211. The difficulty in the present case has arisen from the practice of tramway promoters of obtaining the sanction of the Light Railway Commissioners to the construction of tramways as light railways under the Light Railways Act, 1896, the intention of Parliament in that Act being to put light railways in a better position in many respects than that in which tramways were put by the Tramways Act, 1870. [They referred to the Tramways Act, 1870, ss. 4, 5, 8, 15, 43, and the Light Railways Act, 1896, ss. 7, 11, 13, 19.] In *Glasgow Corporation v. Assessor of Railways and Canals* (2) Lord Dundas, following a dictum of Lord Shand in *Assessor of Railways and Canals v. Glasgow Tramway and Omnibus Co.* (3), decided in 1873, held upon the construction of s. 3 of the Valuation of Lands (Scotland) Amendment Act, 1867, that the word "railway" included a tramway, but he was of opinion that the English cases had no direct bearing upon the question. That cannot displace the direct decision of the English Court in the appellants' favour—a decision which has never been questioned from 1892 until the present case. If a tramway were a railway it would be subject to the jurisdiction of the Railway and Canal Commission, but such a claim has never been asserted, and in the *Swansea Case* (4) Wills J. expressly decides the contrary. That view is supported by a comparison of the Regulation of Railways Act, 1873, with the Regulation of Railways Acts, 1868 and 1871. In the two earlier Acts the term "railway" expressly includes tramways, but in the later Act no mention is made of tramways, and the inference is that in order to make the term "railway" include a tramway in the Railway Acts an express enactment is required. The authorities shew that a railway and a tramway are distinct things. [They also referred to *Hay v. Edinburgh Water Co.* (5) and *Craig v. Edinburgh Street Tramways Co.* (6)]

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(1) (1873) L. R. 9 Q. B. 9.

(4) [1892] 1 Q. B. 357.

(2) (1910) 48 S. L. R. 4.

(5) (1850) 12 Dunlop, 1240; (1854)

(3) Unreported.

1 Macq. 682.

(6) (1874) 1 R. 947.

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Danckwerts, K.C., and C. C. Hutchinson, K.C. (with them *Godfrey Hutchinson*), for the respondents. A railway, or railroad as it was originally called, is a way on which rails are laid along which carriages are moved. The term has been known in this country for more than a century. It is a generic term including various species—railways proper, light railways, tramroads and tramways: see *Bishop v. North* (1); *Matson v. Baird*. (2) The origin of the term is shewn in *Rex v. Bell* (3); and see *Encyclopædia Britannica*, 8th ed., vol. 18, p. 752; *Murray's Dictionary*, vol. 8, p. 114. In the *Century Dictionary* "tramway" is defined as "the earliest form of railroad," and tramways and street railways are treated as synonymous terms. The first railway Act was 16 Geo. 3, c. 32, passed in 1776. That was followed by an Act passed in 1801 (41 Geo. 3, c. 33), for a railway from Wandsworth to Croydon. In the *Stockton and Darlington Railway Act*, 1821 (1 & 2 Geo. 4, c. xlv.), "railway" and "tramroad" are used synonymously. Under all those Acts the only power was animal traction. In the *Railways (Conveyance of Mails) Act*, 1838 (1 & 2 Vict. c. 98), tramways are classed with railways. Under the *Tramways Act*, 1870, s. 34, the carriages must be moved by animal power unless otherwise authorized by the special Act. The description in that section shews that a tramway is a railway in its generic sense. In the *Tramways (Ireland) Act*, 1860 (23 & 24 Vict. c. 152), where the terms "tramway" and "tramroad" are used synonymously, a similar provision is to be found (s. 24), and it is also provided that for the purposes of certain Acts therein mentioned a tramway under that Act shall be deemed to be a railway, although the moving power is animal only (s. 46). [They also referred to the *Highways Act*, 1835 (5 & 6 Will. 4, c. 50), s. 71, and the *Commercial Docks Act*, 1851 (14 & 15 Vict. c. xliii).] In a series of private Acts from 1802 to 1848 the expression used was "railways or tramroads"; then in 1851 the term "tramway" was used in a private Act for the first time; and from 1858 to 1870 the expression is "tramways or railways."

(1) (1843) 11 M. & W. 418, at pp. 425, 426, per Parke B.

(2) (1878) 3 App. Cas. 1082, at p. 1087, per Lord Blackburn,

(3) (1798) 7 T. R. 598,

In many cases ordinary railways run along the streets and the rails are made level with the surface and the method of tramway construction is adopted. There is no difference between a tramway and a street railway; they are both species of one common genus. In *Assessor of Railways and Canals v. Glasgow Tramway and Omnibus Co.* (1) the question arose whether a tramway was a railway within the meaning of the Scottish Valuation Acts (17 & 18 Vict. c. 91 and 30 & 31 Vict. c. 80). Lord Shand, in holding that it was, bases his opinion on the ground above suggested that a tramway was a species of "railway," which was a generic term not limited to railways using locomotive power. The term "railway" is used in its generic sense in s. 211 of the Public Health Act, 1875, and it was used in that sense in s. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and in s. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98). The Act of 1875 was a consolidating and amending Act, and s. 211, sub-s. 1 (b), is taken bodily from the Act of 1848. Therefore the question is what was the meaning of the term "railway" in 1848; and at that date there was no specific tramway legislation. Whatever meaning the word had at that date it has now. In *South Wales Ry. Co. v. Swansea Local Board of Health* (2) Lord Campbell held that the stations and warehouses of a railway were not entitled to the exemption allowed by the Act of 1848 and stated the reason for the exemption to be that the running lines do not enjoy the same benefit from the rates as other property. That reason applies equally to the lines in this case. In *Newport Dock Co. v. Newport Local Board of Health* (3) the Court of Queen's Bench held that a "railway or tramroad" which connected the dock with a canal was entitled to the exemption under s. 55 of the Local Government Act, 1858, which re-enacted s. 88 of the Act of 1848. In *Williams v. London and North Western Ry. Co.* (4), where the same question arose as in *South Wales Ry. Co. v. Swansea Local Board of Health* (5), A. L. Smith L.J. defines railway in the widest possible terms. In *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban*

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(1) Unreported.

(3) (1862) 2 B. & S. 708.

(2) (1854) 4 E. & B. 189, at p. 196.

(4) [1900] 1 Q. B. 760.

(5) 4 E. & B. 189.

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District Council (1) Sir Gorell Barnes discusses the history of the terms "tramroad" and "tramway" and his judgment shews that the same basic idea applies equally to tramways, tramroads, and railways. Farwell L.J. also says that the word "railway" has not acquired any exact technical meaning. In the *Wakefield Case* (2) Lord Loreburn says that the structure was a railway. That means the physical structure. But in that case the light railway was constructed in a manner indistinguishable from a tramway. The question is what is the structure in fact. Where a light railway and a tramway are worked as one connected system and differ in no material respect it would be a remarkable result that one should be held entitled to the exemption and the other not; and the only practical effect of such a decision would be that in future all tramways would be constructed as light railways. The exemption conferred by s. 211, sub-s. 1 (b), applies to occupiers of land used only as a railway constructed under the powers of an Act of Parliament. The conclusive test is the character of the user. The railway must be constructed under an Act of Parliament (see *North Eastern Ry. Co. v. Leadgate Local Board* (3))—and the reason for that condition is that the undertakers are thereby put under special obligations as to the conveyance of the public, who have therefore a quid pro quo—but the sub-section does not say that it must be constructed as a railway or under an Act dealing with the construction of railways. Until the Tramways Act, 1870, tramways, which were constructed sometimes along private lands and sometimes along streets, were in point of fact constructed under the Railways Clauses Acts, but subject always to the proviso that they were not to be used for mechanical power, and the Act of 1870 was passed to obviate the inconvenience of that course. That disposes of the argument that "railway" as used in railway legislation cannot include tramways in the absence of an express enactment. Upon a rational construction of s. 211, sub-s. 1 (b), of the Public Health Act, 1875, the term "railway" includes a tramway. This tramway satisfies all the conditions of the sub-section and is therefore entitled to the exemption. [They also referred to *Edinburgh*

(1) [1907] 1 K. B. 568.

(2) [1908] A. C. 293.

(3) (1870) L. R. 5 Q. B. 157.

Street Tramways Co. v. Edinburgh Corporation (1); *Dudley Corporation v. Dudley, Stourbridge and District Electric Traction Co.* (2); *Clarke v. West Ham Corporation.* (3)]
Ryde, K.C., replied.

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The House took time for consideration.

July 24. VISCOUNT HALDANE L.C. My Lords, in this case I have had the advantage of considering the judgment about to be proposed by my noble and learned friend Lord Moulton, and I concur in it. I am asked by my noble and learned friend Lord Shaw to say that he also concurs in that judgment.

LORD MOULTON. My Lords, this is an appeal from a judgment of the Court of Appeal in England upon a special case stated by two of His Majesty's justices of the peace in and for the county of Middlesex under the provisions of the Summary Jurisdiction Acts, 1857 and 1879, for the purpose of obtaining the opinion of the High Court on a question of law which arose before them upon an application of the appellants, the Tottenham Urban District Council, to enforce the payment of the balance of a certain rate amounting to 495*l.* 12*s.* 6*d.* by the respondents, the Metropolitan Electric Tramways Company, in respect of a tramway owned and worked by the respondents in the district. The respondents had paid a sum equal to one fourth of the said rate, and claimed to be exempt from payment of the other three fourths by reason of the provisions of s. 211 of the Public Health Act, 1875. The magistrates held that the respondents were not entitled to the benefit of the exemption, and affirmed the rate, but at the request of the respondents stated the present special case in order to obtain the decision of the Courts upon the point.

The special case came before a Divisional Court of the King's Bench Division, which affirmed the decision of the magistrates, it being admitted by the respondents that the case was covered by the decision of a Divisional Court in the case of *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary*

(1) [1894] A. C. 456.

(2) (1907) 5 L. G. R. 1077.

(3) [1909] 2 K. B. 858.

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Authority (1), and that such decision was binding on the Divisional Court. From this decision an appeal was brought to the Court of Appeal, which reversed the decision of the Divisional Court, and in doing so expressly overruled the *Swansea Case*. (1) From this decision of the Court of Appeal the present appeal is brought.

The tramways in respect of which the rate is claimed were constructed by the North Metropolitan Tramways Company under the North London Suburban Tramways Order, 1879 (confirmed by the Tramways Order Confirmation Act, 1879), the North Metropolitan Tramways Act, 1892, and the North Metropolitan Tramways Act, 1897. To these Acts the provisions of the Tramways Act, 1870, apply. It has not been suggested (nor could it have been so with any show of reason) that any portion of these tramways stands in a different position from the others with regard to its right to the exemption claimed. It will, therefore, conduce to clearness if the question of the exemption be considered in respect of some one of the tramways, say that constructed under the Order of 1879. The right to the exemption in question, if it exists, must have accrued at the date of its construction, because there has been no subsequent legislation which could in any way affect it.

Sect. 211 of the Public Health Act, 1875, deals with the assessment and levying of general district rates under the Act, and provides that they shall be levied on the full net annual value of such property. But there are certain exceptions, the only relevant one being as follows: "211.—(1.) (b). The owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable meadow or pasture ground only; or as woodlands market gardens or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof."

Speaking for myself, I cannot think that if the question of the exemption or non-exemption of a tramway from the full

incidence of the general district rate had come before the Courts soon after the date of this Act the Courts would have found any difficulty in deciding the question, or would have had any doubt that tramways were not included in the term "railways." For to my mind these two terms had, in the public legislation of this country, different and distinct meanings attached to them by the highest sanction that it is possible to give, i.e., that there existed two independent groups of statutes of a public nature, the one applying to railways and the other to tramways, framed on distinct lines and recognized as applicable to distinct subject-matter, and neither finding it necessary to give any definition of such subject-matter. Nothing could be more striking than the careful and elaborate research of the counsel who appeared on behalf of the respondents before this House in the argument of this appeal, and yet they have been unable to find one single instance of confusion in the use of these terms in public legislation or of doubt as to the limits of the applicability of any piece of public legislation in this respect, at all events before the passing of the Light Railways Act, 1896. Indeed, if the public Acts relating to railways be examined, it will be found that in the one or two instances where the legislation is intended to apply to tramways also it is effected by the insertion of a special interpretation clause providing that in that Act the term "railway" shall include tramway. But in the great bulk of the public legislation relating to railways there is no such definition clause, and that legislation has universally been understood and interpreted by the Courts as applying only to that which is popularly known as a railway, and not to that which is popularly known as a tramway.

To my mind, therefore, the fact that the Legislature uses the word "railways," and does not say "railways and tramways," in s. 211 of the Act of 1875, is conclusive as to whether it is intended that tramways should enjoy this exemption. For in the year 1875 tramways loomed very large in the public view. The demand for them, and the necessity of regulation of the terms on which the privilege of constructing them should be granted to private undertakers in view of the interests of the public, had during the preceding few years become so marked that a most

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important general Act regulating them, i.e., the Tramways Act, 1870, had been passed, after much discussion and careful examination in its passage through Parliament. It is to my mind impossible that the Legislature should in 1875 have used the word "railways" as including tramways without inserting a definition clause expressly including them as it had done in certain previous Acts. But if it had intended that the exemption should apply to tramways, it would, in my opinion, have in all probability taken the simpler course of saying so expressly in the clause itself, and I am confirmed in this opinion by the language of s. 147 of the same Act, which deals with the power of an urban authority to adopt bridges within its district. Here the words are: "Any urban authority may agree with the proprietors of any canal railway or tramway to adopt and maintain any existing or projected bridge viaduct or arch within their district, over or under any such canal railway or tramway."

In the exemption that is to be found in s. 211, sub-s. 1 (*b*), canals and railways are mentioned, but there is no mention of tramways, and it would, in my opinion, be contrary to sound principles of the construction of statutes if we were to interpret railways as including tramways in this section in disregard of the consistent usage of the words in public statutes, and the evidence which the statute itself gives in s. 147 that it recognized the distinction between the two terms.

The respondents attempt to meet these difficulties by a very ingenious argument. They point out that the Public Health Act, 1875, was a consolidating statute, and that s. 211 is taken from the Public Health Act of 1848, and they argue, therefore, that it should be interpreted as the language would have been interpreted in 1848, and not in 1875. There are two answers to this argument. In the first place, the Public Health Act, 1875, was not purely a consolidating statute. It purported to amend as well as to consolidate the existing public health statutes, and did so to a very substantial extent. But the main answer to the argument is that no assistance is obtained by going back to the Act of 1848. At that time public tramways, in the sense in which the words are always used, were unknown, and certainly the term "railways" could not have been used by the Legislature,

at that date, with the conscious intention of including therein what we now know as tramways. If this House had to determine the question as if it arose in the year 1848, one would have to look closely at the language used in order to learn from it what were the grounds on which the exemption was granted to railways in order to decide whether those grounds applied to the new type of works known as "tramways." It is always a dangerous, and generally an unfruitful, task to seek for the motives which influence the Legislature in any particular legislative Act, but if I were to permit myself so to do, I should base my conclusions on the company in which I find railways standing in the exemption. Its companions are "land covered with water," "land used only as a canal or a towing-path for the same," and it itself appears as "land used only as a railway constructed under the powers of any Act of Parliament for public conveyance." In view of the common characteristics of these three hereditaments, it appears to me that the Legislature is dealing with a class of lands stricken with a certain disqualification for partaking in the advantages of municipal expenditure by reason of the nature of the user of those lands, namely, either as being covered by water or being used solely as a canal or solely as a railway. And I may add that if I were considering the question as in 1848 I should have concluded that "lands" was used in the section in its ordinary and natural meaning, and not in the extended meaning which is given to it in questions of rating. I do not believe that the Legislature had before it at that date the conception of a railway running on lands other than those which had been acquired for the railway and which were dedicated to the use of the railway properly so called. But in 1875, when the existing Public Health Act was passed, the Legislature must be taken to have been fully seised of the existence of tramways availing themselves of the public streets, and also to have been aware that, in the language of public statutes, these new constructions were always called by the special name of "tramways," and under such name were subject to special legislation. The fact that the word "railways" did not include "tramways" is, as I have said, recognized in the statute itself, and it would, in my opinion, be pushing the doctrine of tracing back the origin of

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sections in consolidating statutes too far if under such circumstances we were to hold that in the Public Health Act, 1875, a different meaning ought to be given to the word "railways" in s. 211 from that which it would naturally bear at that date.

If it were admissible to speculate as to the motives of the Legislature in exempting railways from the full burden of the rates I should be inclined to adopt the view expressed by Erle J. in the case of *South Wales Ry. Co. v. Swansea Local Board of Health*. (1) He there says: "The general scheme of the enactment is, that the occupiers of the classes of property most benefited by the expenditure of the district rates shall be liable to be rated at a higher rate, the occupiers of the classes less benefited at the lower rate." This fully accounts for the exemption of railways running on their own lands and partaking of few, if any, of the advantages of municipal expenditure so far as their line is concerned. But tramways are not in a like position. The public streets provide them not only with support for their rails but also, as it were, with arrival and departure platforms, for they collect and deposit their passengers all along the route which they take. I can think of no class of property within a town which more directly, and to a fuller extent, reaps advantage from municipal expenditure, in the way of the construction, maintenance, lighting, and sewerage of streets, (which form so large an item of municipal expenditure) in addition to its dependence on the general prosperity of the town, which is secured by municipal expenditure on other objects. Tramways seem to me so little in *pari casu* with land solely occupied for railways in the matter of meriting exemption from rates that I have the greatest doubt whether any responsible authorities in 1875 would have proposed to exempt tramways from the full burden of rates, or if they had proposed it the Legislature would have granted it. One cannot forget that in the year 1875 tramways were entirely in private hands, and there is no trace in the legislation of that period of any desire on the part of the Legislature to put them in a favoured position.

One other argument of respondents' counsel must here be

(1) 4 E. & B. 189, at p. 197.

noted. It was urged with great elaboration that "tramways" etymologically fall under the denomination "railways" by reason of the fact that the cars run upon rails. In my opinion, such arguments have little or no value. The meaning of words is fixed by usage, and if, as in my opinion is the case here, the two words "railway" and "tramway" had in popular and legislative usage distinct meanings, it makes no difference whatever whether those meanings flow from the etymological genesis of the words or not. When people spoke of tramways in 1875, there is, in my mind, no doubt that they meant something different from railways, and when the Legislature used these two words in the two streams of legislation relating to railways and tramways, they recognized and followed this distinction of usage, and that is all that is necessary and sufficient for the purposes of the construction of the relevant statutes.

Before passing to the events which occurred in 1896, and subsequently, which have, in my opinion, given rise to all the difficulties in this case, I must notice the case of *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* (1), which was decided in 1892 by a Divisional Court of the Queen's Bench Division, consisting of Wills and Hawkins JJ. This raised the precise point in issue in the present case. The tramway in that case was a tramway running through the streets of Swansea which was continuous with what was known as the Oystermouth Railway, which was a railway constructed under the powers of 44 Geo. 3, c. lv., upon land belonging to the company. It was admitted that the company were entitled to the exemption with regard to the Oystermouth Railway, but the sanitary authority contended that that exemption did not apply to the tramway. The Court upheld this view. I entirely adopt the language of Wills J. in his judgment in that case, where he says: "The objection which has been taken on the part of the urban sanitary authority, and which, in my opinion, is a good one, is that tramways are something essentially different from railways, and that in the legislation of 1875, where railways are spoken of they cannot possibly be supposed to include tramways. By that time tramways were so completely part of the ordinary communication made

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use of in this country, that in 1870 a Tramways Act had been passed consolidating the provisions which in all ordinary cases for the future were to apply to tramways. The Legislature, when it passed that Act, did not think it necessary to define a tramway, and, as definition is always '*periculosæ plenum opus aleæ*,' I shall follow the example of Legislature, and not attempt to define either railway or tramway. It appears sufficient to say that no ordinary person has any difficulty in distinguishing between the two. It seems to me, therefore, that the exemption in favour of railways cannot have been intended in the Act of 1875 to cover tramways."

The decision in this case remained unchallenged until it was overruled by the decision of the Court of Appeal from which the present appeal is brought.

I now turn to the matters out of which, in my opinion, any difficulties that exist in the present case have arisen. In the year 1896 the Legislature passed the Light Railways Act, 1896. Its full title was "An Act to facilitate the construction of Light Railways in Great Britain." It established a Board of three Commissioners, who were to receive applications for powers to construct light railways and to make Orders therefor, which, upon confirmation by the Board of Trade, were to have the same effect as if enacted by Parliament. With the exception of certain Acts specially named in the Act, and subject to any special provisions contained in the Order authorizing the railway, it was provided that "the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway." It is clear from this language and from the language of other portions of the Act that the Legislature intended these light railways to be, and to be treated as, railways in the full sense of the word, though exempted from many of the obligations of railways, and entitled to special privileges. These special privileges were very great, and, indeed, if the Commissioners thought fit, they might make them exceptionally so, because the powers of the Commissioners with regard to the terms on which the railways should be authorized were subject to very few restrictions. In many other ways also these light railways were exceptionally favoured. The Treasury might

make loans for their construction, or even special advances in the nature of free grants. Persons with power, either by statute or otherwise, to sell and convey land for the railway might, with the sanction of the Board of Agriculture, do so wholly or partially without payment of its value. The provisions for assessing the compensation for lands compulsorily taken differed from those up to that time applicable to the compulsory acquisition of land, and were exceptionally favourable to the promoters of the railway, and in other respects the statute shews that the Legislature intended to place these light railways in a highly favoured position in order to stimulate their construction.

Now, there is not the slightest justification for viewing the Light Railways Act, 1896, as indicating or expressing any change of policy on the part of the Legislature with regard to the treatment of tramways. It is evident from a perusal of the Act that what the Legislature sought to facilitate thereby was the construction of railways for the purpose of opening out agricultural districts or other isolated centres of production and bringing them into communication with the towns and the general railway system of the country. Unfortunately this, which is the plain object and intent of the Act, has not been adhered to. Tramway promoters were astute enough to see that undertakings which were purely and simply schemes for the construction of tramways in the ordinary sense of the word might be put forward under the guise of being schemes for light railways, and that if they could successfully elude the vigilance of the authorities they would thereby gain for the tramways the exceptional privileges intended only for undertakings of a widely different character. In this attempt they were only too successful, and, by reason of what I have no hesitation in regarding as an abuse of the Act, schemes were sanctioned under the authority of the Light Railways Act, 1896, for the construction of what ought to have been regarded as tramways, and subjected to the carefully considered conclusions of the Legislature in respect thereto which are embodied in the Tramways Act.

The undertakings so sanctioned have secured irrevocably the status and privileges of light railways, however little they have merited it. But the lines to which the present case directly

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relates are not in this position, because they were constructed under Tramway Acts, and therefore it is only indirectly that this House is concerned with what has been done under the Light Railways Act, 1896. It has, however, become necessary for me to refer to that Act as I have done because of two decisions of this House upon which respondents' counsel strongly relied, namely, *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban District Council* (1) and *Wakefield and District Light Ry. Co. v. Wakefield Corporation*. (2) I shall now proceed to examine these decisions.

In *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban District Council* (1) the question to be decided was whether a tramroad which was placed on raised rails laid on sleepers, and was constructed on land the exclusive property of the company, and which was fenced off from adjoining land except at the level crossings of roads, was entitled as a "railway" to the benefit of the exemption. It was constructed under Acts which incorporated the Lands Clauses Act and large and important portions of the Railways Clauses Consolidation Act, 1845, and for the purposes thereof the tramroad in question was to be deemed a railway, and the company was to be deemed a railway company. So much for the nature and legal status of the tramroad. But the undertaking also included a tramway, and so far as that portion was concerned, and that only, certain provisions of the Tramways Act, 1870, were also incorporated. My only difficulty with regard to this case is to understand how there could be any doubt that this tramroad was entitled to the exemption given by s. 211, sub-s. 1 (b), of the Public Health Act, 1875, on the ground of being a railway within the meaning of that section.

Lord Macnaghten, who delivered the judgment of this House, deals with the case very plainly and very briefly. He treats it as a case of *res ipsa loquitur*. "Would anybody," he says, "seeing this road or way, or the photographs of it, which are in evidence, call it anything but a railway?" He then points out that the parliamentary powers under which it was constructed support its claim to the status of a railway, as they undoubtedly did.

(1) [1907] 1 K. B. 568; [1909] A. C. 264.

(2) [1907] 2 K. B. 256; [1908] A. C. 293.

The only assistance that, in my opinion, this decision gives to your Lordships in the present case is that it is impossible to read Lord Macnaghten's opinion without realizing that that eminent judge did not think that what is popularly known as a tramway was a railway, otherwise he would not have appealed to the photographs of the line or asked the question what it would ordinarily be called, nor would he have troubled himself as to the form of the statutes under which it had been constructed.

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The case of *Wakefield and District Light Ry. Co. v. Wakefield Corporation* (1) raised directly the difficulties caused by the use of the powers of the Light Railways Act, 1896, for the purpose of constructing mere tramways. The railway in that case was structurally and functionally a mere tramway, but the Court of Appeal and this House held (as they were compelled to do) that the line so constructed had the legal status of a railway, and must be treated as such. Its right to enjoy the exemption given to railways by s. 211, sub-s. 1 (*b*), turned, therefore, on the answer to be given to the question whether the "land" which it occupied was occupied solely as a railway constructed under Act of Parliament for public conveyance. This House held that it was so, holding that the words above cited referred only to the user by the railway company, which, of course, was solely for the purpose of their railway. The same result might have been arrived at in another way. The "land" occupied by the tramway is only that portion of the soil which is occupied by its rails, &c., though no doubt it has the right of support from the subjacent land. I doubt whether any other person but the railway can be held legally to occupy the land taken up by the rails, &c., and therefore I do not think it would be legally incorrect to say that the "land" occupied by them was in fact exclusively occupied for that purpose,—a construction which would avoid difficulties that might arise in other cases from reading into the proviso a meaning which would give to all occupiers of land the privilege of the exemption, provided that so far as the land was occupied by a railway it was occupied by the railway company solely for the purposes of the railway.

(1) [1907] 2 K. B. 256; [1908] A. C. 293.

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But however we arrive at it, the conclusion is the same, namely, that seeing that the light railway is a railway, and that it has no occupation of the public streets or the subjacent land save for the purpose of the railway, it is entitled to the exemption. This decision, however, cannot affect the present case, where the subject of taxation is not a railway, but a tramway, constructed under Acts which are specifically tramway Acts, and subject to the privileges and disabilities given to tramways by the public legislation relating to them.

There remains only one head of argument—standing entirely by itself—which must be noticed, and which at first appeared to possess great weight. The Tramways Act, 1870, applies to Scotland. Now, the cases quoted on behalf of the respondents shew that tramways in Scotland are valued by a functionary known as the Railway and Canal Assessor, a fact which at first sight would appear to shew that in Scotland tramways possess the legal status of railways, and are treated as such. If this were the case it would give weight to the contention that they ought to be so treated in England, and to enjoy the exemption as to rating granted to railways.

But when the matter is looked into more closely it assumes a very different appearance. The rateability of tramways in Scotland was established by a decision which rested, not upon their being railways, but (as in England) upon their being in occupation of land. It is true that in consequence of that decision tramways came to be valued by the Railway and Canal Assessor, but this did not imply that they were recognized as having the legal status of railways, because the functions of the Railway and Canal Assessor are not confined to valuing railways and canals. He can be called upon to value water companies, gas companies, and any other concerns which traverse more local units than one, and seeing that he has such special experience, he is evidently the most suitable person to value such a subject as the continuous route of a tramway. But the matter in Scotland was put into a position still more widely different from that in which it stands in England by the Burgh Police Act, 1892, applicable only to Scotland, which, by s. 347, expressly provides that railways and tramways eo nomine shall

be entitled to the three-fourths reduction. This does not apply to counties (where both railways and tramways are rated at their full value), nor does it apply to parishes where there is a power of classification of property subject to the rate which is not governed by any such rule, but inasmuch as the Act does not apply to England it is immaterial to the decision of the present case and requires no further notice.

For all these reasons I am of opinion that in public legislation the word "railway" does not include tramway unless it is expressly made so to do by the terms of the Act. To hold otherwise would be to put tramways under the exclusive jurisdiction of the Railway and Canal Commissioners, a thing which has never been suggested during the forty years of the existence of that Court, and is obviously contrary to the intention of the Legislature in creating it. The word "tramway" has had both popularly and legally a distinct meaning for at least forty years, and although the action of the Light Railway Commissioners may have produced some confusion, and has certainly led to the exemption being obtained in cases in which it was not merited, this cannot affect a case like the present, where the subject of taxation is neither legally nor popularly a "railway." I am of opinion, therefore, that the appeal should be allowed, that the judgment of the Divisional Court should be restored, and that the respondents should pay to the appellants their costs here and in the Court below.

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Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, July 24, 1913.

Solicitor for appellants : *Francis Shelton.*

Solicitors for respondents : *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

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July 28.	PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED	RESPONDENTS.

Restraint of Trade—Agreement by Employee not to be engaged in Business the same as or similar to that of Employer—Reasonableness of Restriction—Vagueness—Injunction.

By a contract for the employment of the defendant as canvasser by the plaintiffs, a clothing and supply company having branches all over England, described in the contract as carrying on business on the check and credit system "at London in the county of Middlesex (amongst other places)," the defendant agreed that he would not within three years after the termination of the employment be in the employ of any person, firm, or company carrying on or engaged in a business the same as or similar to that of the plaintiff company, or assist any person employed or assisting in any such business, "within twenty-five miles of London aforesaid where the company carry on business":—

Held, assuming, without deciding, that the agreement was not too vague as regards the area of restriction to be enforced by injunction, that the restriction was wider than was reasonably necessary for the plaintiffs' protection.

Decision of the Court of Appeal [1913] 1 K. B. 65, reversed.

APPEAL from an order of the Court of Appeal reversing an order of a Divisional Court on an appeal from the Clerkenwell County Court. (1)

By an agreement for partial services as canvasser and collector dated March 25, 1908, and made between the respondents, therein described as carrying on "the business of a general clothing and supply company on the check and credit system at London in the county of Middlesex (amongst other places)," of the one part, and the appellant, therein described as "of No. 64, Tuffnell Park Road, Islington, London aforesaid," of the other part, the respondents agreed to employ the appellant in the capacity of a canvasser

* *Present*: VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

until the engagement for services created by the agreement should be terminated as thereafter mentioned. The appellant was to be remunerated by a commission on sums collected by him for the respondents as therein mentioned, and the agreement provided that the appellant's engagement might be terminated by either party at any time on giving two weeks' notice.

Clause 8 of the agreement provided as follows :—

“And in consideration of the premises the said William Milne Mason hereby agrees that he shall not within three years after the termination of his engagement and services with the company be in the employ of, or be engaged in any manner whatsoever whether on his own account, or as partner with, or agent, or manager, or assistant, for, any person or persons, firm or firms, company or companies, carrying on or engaged in the same or a similar business to that of ‘The Provident Clothing and Supply Co. Ltd.’ carried on as aforesaid or be engaged by, or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping (either directly or indirectly) in the carrying on of the same or a similar business, or assist or help any one in the formation of such a business, society or club as aforesaid within twenty-five miles of London aforesaid where the company carry on business or within twenty-five miles of any place where the said William Milne Mason shall have been employed by the company at any time during the continuance of this agreement. And if the said William Milne Mason shall be engaged as aforesaid he shall forfeit to the company the sum of twenty-five pounds by way of liquidated damages, and not as a penalty.”

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The “check and credit” system as carried on by the respondents may be briefly described as follows: The respondents invited members of the public (who must be householders or other approved persons whose financial position was satisfactory to the respondents) to become members of their society. In order to become a member, an applicant must apply for what was known as a “check,” or “share” of the

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company, the value of which might be anything from 10s. up to 10l. The price charged by the respondents for these "checks" or "shares" was the nominal value of the check, plus an additional sum by way of interest (called "poundage") of 1s. in the pound on the nominal value of the check. The amount of the check was payable by the member to the respondents by weekly instalments of 1s. in the pound. The check was issued to the member on payment by him of the sum charged for poundage and of three weekly instalments. Arrangements were made by the respondents with various local shopkeepers for the supply of goods of every description to members on presentation of these checks, and a list of such shops was given to the members. All goods so supplied were charged by the shopkeepers to the respondents and paid for by them, the shopkeepers allowing to the respondents a considerable discount in consideration of the introduction of the business and of the security for payment which the shopkeepers thus obtained. Members were not obliged to spend the whole amount of the check at any one shop or time, but might go to as many shops as they liked, provided they were included in the respondents' shop list. On the occasion of each purchase the shopkeeper indorsed the amount expended at his shop on the back of the check and signed or initialled it and returned it to the member until the whole amount of the check was exhausted. In the latter case the check was retained by the shopkeeper with whom the final instalment was spent.

The whole of this business was conducted by the respondents by means of canvassers whose duty it was to canvass for orders for checks and to collect the weekly instalments as they became due. The respondents employed between 6000 and 7000 canvassers in England and they had about 100 different branches to which these canvassers were attached. They had fifteen district offices in London and about 1000 canvassers were attached to those offices. These canvassers required a special training from the respondents' manager to qualify them for the performance of their duties and received printed instructions to be observed by them as to the mode in which persons were to be canvassed. Each canvasser had a special district assigned to him.

The appellant was attached to the respondents' Islington branch

office and was employed exclusively in that district. He was dismissed by the respondents on May 16, 1911, and shortly afterwards he entered the employ of the People's Supply Company, who carried on a similar business at 315, Upper Street, Islington.

The respondents brought an action against the appellant in the county court for an injunction to restrain him from violating clause 8 of the agreement, and for damages. The county court judge granted an injunction, but his order was reversed by the Divisional Court (Pickford and Avory JJ.) upon the ground that the clause was too vague to be capable of being enforced by injunction.

The Court of Appeal (Vaughan Williams, Kennedy, and Buckley L.JJ.) reversed the order of the Divisional Court and restored the order of the county court judge subject to a modification in the form of the injunction.

1913. June 27, 30. *Rawlinson, K.C.*, and *J. B. Matthews*, for the appellant. 1. This agreement is in unreasonable restraint of trade. Upon the construction of the agreement the twenty-five miles area does not apply to the first part at all. Therefore there is no limit as regards space. Assuming that it does apply it qualifies the employer and not the employee, and the appellant might be restrained from working for a similar company, say, at Newcastle. Upon any construction of the agreement a radius of twenty-five miles is wider than is reasonably required for the protection of the respondents. *Sir W. C. Leng & Co. v. Andrews* (1) is in point.

2. The agreement is too vague to be enforced by injunction. "London aforesaid" must mean London in the county of Middlesex, but there is no such place in existence. But apart from that objection there is no certainty about the meaning of the word "London." The Court will not grant an injunction which is not absolutely clear and definite.

Danckwerts, K.C., and *W. J. Waugh, K.C.* (with them *Harold Newell*), for the respondents. Having regard to the peculiar nature of the respondents' business the restriction is not wider

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than is required for their reasonable and necessary protection. The fact that the canvassers receive special instruction from the respondents' manager is an element to be taken into account. Every trader has a peculiar mode of conducting business, and in modern times the profits of a business are largely dependent on the mode in which the business is conducted. Every employee in the ordinary course of business would naturally acquire certain facilities in the art of conducting the business in the manner adopted by his employer, and the employer is entitled to say "I will not have the skill and knowledge acquired in my employment imparted to my trade rivals." The question does not depend upon personal contact with the employer's customers, but upon the general knowledge of the employer's business. It is that general knowledge which puts the prentice in a position to compete with his master and makes him a source of danger against which the master is entitled to protect himself: *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (1); *Dowden & Pook, Ltd. v. Pook* (2); *Haynes v. Doman* (3); *Dubowski & Sons v. Goldstein* (4); *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.* (5)

These partial restraints are for the benefit of the public and of the employees themselves, because the employer will not withhold from his employee instruction in the secrets of his trade and the communication of his own skill and experience, as he otherwise would do, from fear of his afterwards having a rival in the same business: *Mallan v. May* (6); *Mumford v. Gething*. (7) In cases of partial restraint the onus is on the covenantor to prove that the restraint is unreasonable: *Mills v. Dunham* (8); *Haynes v. Doman*. (9)

The fact that this agreement provides a special remedy does not take away the right of the employer to enforce the agreement by injunction: *National Provincial Bank of England v.*

(1) [1894] A. C. 535.

(2) [1904] 1 K. B. 45, at p. 55.

(3) [1899] 2 Ch. 13, at pp. 25 and 28.

(4) [1896] 1 Q. B. 478.

(5) [1892] 3 Ch. 447, at p. 452.

(6) (1843) 11 M. & W. 653, at p. 666.

(7) (1859) 7 C. B. (N.S.) 305, at p. 319.

(8) [1891] 1 Ch. 576, at p. 586.

(9) [1899] 2 Ch. 13, at p. 17.

Marshall (1); *General Accident Assurance Corporation v. Noel*. (2) H. L. (E.)

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This agreement is not too vague to be capable of enforcement. The agreement must be construed without regard to the question of the reasonableness of the restriction: *Mills v. Dunham*. (3) "London in the county of Middlesex" means that part of London which was in Middlesex before London was made a separate county. A somewhat similar point arose in *Mallan v. May*. (4) Upon the respondents' construction both the time limit and the distance limit cover the whole clause and the words of restriction qualify not the person but the business. It follows that it is competent to the appellant to serve the company in whose employment he now is in any place outside the twenty-five miles area. So construed the clause cannot be regarded upon the authorities as unreasonably wide.

J. B. Matthews replied.

[Reference was also made to *Horner v. Graves* (5); *Ward v. Byrne* (6); *Whitwood Chemical Co. v. Hardman*. (7)]

The House took time for consideration.

July 28. VISCOUNT HALDANE L.C. My Lords, this is an appeal from a judgment of the Court of Appeal reversing a judgment of a Divisional Court, which had set aside an order of the judge of the Clerkenwell County Court. An action had been brought in that Court by the respondents, who claimed damages for past breaches, and an injunction to restrain the appellant from further breaches of an agreement dated March 25, 1908.

My Lords, the respondents are a limited company whose objects are to carry on the business of a clothing and supply association in the United Kingdom and elsewhere, and to make arrangements with persons engaged in trade for concessions to any of the company's members of special privileges. Their method of business is known as the "check and credit system." Under this system they invite householders, or other approved

(1) (1888) 40 Ch. D. 112.

(4) 11 M. & W. 653.

(2) [1902] 1 K. B. 377.

(5) (1831) 7 Bing. 735.

(3) [1891] 1 Ch. 576.

(6) (1839) 5 M. & W. 548.

(7) [1891] 2 Ch. 416.

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persons, to become members by applying for a "check" or share of the company, the amount of which is payable by instalments. Local shopkeepers with whom the respondents have made arrangements supply goods to these shareholders on presentation of a "check" representing the share. The goods so supplied are charged by the shopkeepers to the respondents, who pay for them, obtaining a discount. The business is developed by means of canvassers employed by the respondents, and to each of these canvassers a district is assigned.

The appellant was engaged as a canvasser and executed the agreement in question. This was to the effect that he was employed as canvasser and collector on an engagement terminable on a two weeks' notice on either side. By clause 4 he entered into an engagement substantially in the same terms as clause 8, to the terms of which I shall presently allude, but limited to the period of his service.

Clause 8 relates to the time after his service has terminated and is in these terms: [His Lordship read it.]

My Lords, it is on this clause that the appellant was sued. If the clause was a valid one I think that the respondents were entitled to an injunction. For the words disclose what purports to be an agreement, and the mere fact that there is a special remedy provided by way of liquidated damages or penalty does not take away the *prima facie* right to enforce the agreement by injunction. Such cases as *National Provincial Bank of England v. Marshall* (1) and *General Accident Assurance Corporation v. Noel* (2) illustrate the principle of construction in this class of agreement. But other points were taken for the appellant before the county court judge. It was said that the agreement was bad, because it went further than was necessary for the protection of the respondents' business, and was therefore in undue restraint of trade. It was further said that the clause was bad for vagueness, and particularly because London was a place of description which was too indefinite, and, moreover, was described in the early part of the agreement as London in the county of Middlesex, a place that was non-existent. My Lords, I do not think it necessary to discuss the question whether this

(1) 40 Ch. D. 112.

(2) [1902] 1 K. B. 377.

description of London in the county of Middlesex invalidated the agreement. It may well be that the maxim *falsa demonstratio non nocet* applies to such a case. Nor do I propose to examine the argument as to general vagueness. It is true that the Divisional Court, which consisted of Pickford and Avory JJ., decided against the respondents on this point. They did not enter into the wider question whether the clause was altogether invalid as being in undue restraint of trade, because they thought that they were bound by a previous decision on the point by another Divisional Court. But this wider question goes to the root of the whole claim, and I desire to direct my observations to it.

The Court of Appeal, differing from the Divisional Court, appear to have thought not only that the clause was sufficiently intelligible to form the subject of an injunction, but that its validity was established by the finding of the county court judge that the appellant, as a paid servant, had been so trained by his employers, the respondents, that he had become, in the language of Buckley L.J., "a particular sort of expert" who would, if he engaged in a similar business, be interfering with his employers' business.

My Lords, this is not the case of an agreement made to protect the sale of a goodwill, or to guard against the disclosure of special trade secrets. The capacity of the servant must obviously, from the character of the business as I have described it, be due mainly to natural gifts as a canvasser, and only in a secondary degree to special training. If so, it is necessary to consider carefully the extent of the restraint imposed. Such agreements are frequently insisted on, but they are invalid if they go beyond what is necessary for the protection of the rights of the employer. Whether there are such rights must depend on the character of the business. Now, the character of the respondents' business does not appear to me to be such as to entitle them to say that they had any right which justified them in excluding the appellant from exercising his talents, such as they were, altogether or within a wide area. Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places

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He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they could have restrained him from doing this. But the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid. The county court judge has taken evidence which shews what the character of the work done for the respondents by the appellant was, and it is with reference to this work that the validity of the agreement must be tested. Now, clause 8 is in very wide terms. I will assume in the respondents' favour, what I do not think it necessary to decide, that the twenty-five-mile limit applies to every branch of this clause, so that there is no unrestricted area to which it applies. But even so, the appellant would have bound himself for three years not to be employed in the same or a similar business within twenty-five miles of London or of any place where he had been in the employment of the respondents during the currency of the agreement, an agreement, be it observed, which might not have lasted more than a fortnight. He further bound himself to abstain within the same limits of time and space from assisting, even without remuneration, any one who was helping in connection with any such business.

My Lords, such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the Courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the Courts as being for the Court itself, and to be decided in accordance with a definite legal test. Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and of the employment and, I think, also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is reasonable, but because what is usual is to some extent

a guide in the consideration of the requirements of the particular business. On this point I agree with what was said by Fletcher Moulton L.J. in his judgment in *Sir W. C. Leng & Co. v. Andrews* (1), which seems to me quite consistent with what was laid down by Lindley M.R. in *Haynes v. Doman*. (2)

The test is now settled. The law is summed up in Lord Macnaghten's judgment in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (3) After pointing out, as Lord Watson had already done, that the standard of public policy must be the standard of the day, and that what was laid down as to public policy a long time ago may be of little use in settling what the actual standard is, he says: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

My Lords, the respondents have to shew that the restriction they have sought to impose goes no further than was reasonable for the protection of their business. But even assuming the construction most favourable to them, that which makes the words introducing the twenty-five miles limit apply to every branch of the restrictive language, I think that they fail to shew this. I have examined the evidence as to the character of the business and the document which sets out particularly the duties of these canvassers. I can find nothing to lead me to think that the canvasser could become possessed of any special knowledge

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(1) [1909] 1 Ch. at p. 770.

(2) [1899] 2 Ch. at p. 24.

(3) [1894] A. C. at p. 565.

H. L. (E.) of the kind recognized as a trade secret. I doubt whether there were any secrets in this business. The success of the canvasser depended, as I have already said, mainly on his natural aptitude. No doubt he might acquire, in the course of his employment, lists of actual or possible customers in the district in which he had canvassed. I think that under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers. But that is not the clause which the respondents in this case did frame. They have chosen to try to bind the appellant to an extent which might be necessary for their protection if they had been carrying on a business of a different kind.

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The reported cases afford instances of varying descriptions in which restriction over a wide area is necessary for the protection of the employer. But in the case of a business which is local, and which is carried on simply by canvassing, it is hardly possible for an employer to justify an area with a twenty-five-mile radius, and I do not think it has been justified here. It is no doubt as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the Court to scrutinize agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the judges have to see that Lord Macnaghten's test is carefully observed. As I do not think that clause 8 complies with that test, I am of opinion that it was void altogether. The order of the Court of Appeal should be reversed and that of the Divisional Court restored.

LORD DUNEDIN. My Lords, I have had the advantage of seeing the opinion which has just been delivered by my noble and learned friend on the woolsack; I concur therein, and I have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. The case is not complex, but it has a far-reaching importance, and on this latter account I deal with it in a little detail.

The appellant, on March 25, 1908, entered into an agreement with the respondents which is called "an agreement for partial services as canvasser and collector." He was employed in this capacity, his remuneration being a commission upon the sums collected from customers. He engaged that he would not during the continuance of his employment serve any other person or firm engaged in a similar business nor assist the servants of such a firm, nor help in the carrying on or the formation of such a rival business, society, or club. This part of the agreement is section 4. There are also other obligations—for accounting for moneys received, for keeping books, and the like—and, on the termination of his service, handing over these, with any balance due, to his employers. The engagement was terminable on a fortnight's warning.

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It is section 8 of this agreement which raises the question before your Lordships' House. It is in these terms: [His Lordship read it.]

A not unimportant article of the agreement also is the ninth, which provides that the respondents shall be at liberty to assign their rights and powers under the contract to any successors or assigns, direct or indirect, of their company. Such successors and assigns would therefore, it was argued, be also entitled to enforce these comprehensive restrictions against the appellant.

On May 16, 1911, the respondents dismissed the appellant. As already mentioned, he was entitled to two weeks' notice, and this was given. Later in the year he entered the service of "the People's Supply Company." The evidence is very meagre, but it appears that the appellant's round of canvassing was among customers within a very limited area, and that his canvassing for his new employers was two miles away. It further appears that the respondents have—apart from London, which will be presently referred to—one hundred different branches in Great Britain, covering the greater part of the country. "Twenty-five miles from every place would leave very little of the map." If, accordingly, under the agreement the appellant, or any other servant under a similar contract, had at any period of his service been employed in other quarters of the country, for however short a time, then these places, as well as London, and an area of

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twenty-five miles round each and all of them, would have come under the operation of the restrictive covenant and have been ground over which it was not permitted to him to take service in any capacity whatsoever with a company in the same line of business.

My Lords, I am not very greatly concerned with discovering whether the sweep of this restrictive clause is, either on the facts as to the employment or on a construction of certain clauses in the articles, confined to within twenty-five miles of London, or extended substantially to the United Kingdom. Nor, for the purposes of the opinion which I am about to deliver, do I take account of the difficulties of saying what would be the exact delimitation of a twenty-five miles circuit of London, or of the places in which the appellant had acted as canvasser. It is no doubt true that an injunction granted in the terms of the judgment of the Court of Appeal restrains employment "within twenty-five miles of London." And it appears to me that he would be in an extraordinarily precarious position if he did any one of the things against which he is enjoined, taking upon himself the risk that London should be taken to be the city of London, or even particular portions of the county of London. So vague is the injunction that I should share the difficulty and hesitation of Pickford J. in putting any person under it. But I desire to decide the question before this House on another ground.

I will take it that the "London" of this contract is a known and defined area, and that therefore twenty-five miles round it is also known and defined. Within that area there are at least six millions of inhabitants, there is a large variety of businesses, and there are rivals in trade conducting business on the check and credit system. So extensive is the area that in London alone the respondents have fifteen different districts and employ about one thousand canvassers. If the judgment of the Court of Appeal stands, the appellant will accordingly be restrained from being in the employment of, or engaged in any manner whatsoever by, or helping directly or indirectly any person who shall be employed with any person, firm, or company, carrying on a business similar to that of the respondents. He

may not, of course, also, help in the starting of a rival business within the area. The restriction lasts for three years, and, as will be seen, is not confined to the appellant canvassing the customers of the old firm or in his old district. But he cannot, throughout any part of this great and densely populated area, take any engagement as a canvasser with their trade rivals, nor can he be employed by them in any other capacity whatsoever. He may not be a manager, a bookkeeper, a clerk, a messenger a typist, a caretaker. The restriction, even granted the limit in time and in area as already stated, is of a comprehensive and most extensive character. The question is whether this restriction is enforceable in a Court of law.

My Lords, conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect.

It is necessary, my Lords, to look, in the first place, at the nature of the contract itself. As to that, the diversities may be wide and the view of the law may be different as to the upholding or the scope of a covenant in restraint of personal or industrial freedom. If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to shew that such a contract—in so far as it restrains the vendor from becoming a rival of a business whose goodwill he has sold and which he has bargained he shall not oppose—there may be elements shewing that such a contract is enforceable, and, indeed, that a declinature by the law to enforce it would amount to a denial of justice. It may clearly appear that the express view of the bargain may have been the elimination from the sphere of competition of the powerful personality of a possible rival who

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H. L. (E.) by the very terms of the contract had been paid for disappearing
 1913 into retirement, carrying his sheaves with him. In such cases a
 MASON restraint is enforced by the law.

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 CLOTHING Case (1), "There is obviously more freedom of contract between
 AND buyer and seller than between master and servant or between an
 SUPPLY employer and a person seeking employment." And in my
 COMPANY, opinion there is much greater room for allowing, as between
 LIMITED, buyer and seller, a larger scope for freedom of contract and a
 Lord Shaw of correspondingly large restraint in freedom of trade, than there is
 Dunfermline. for allowing a restraint of the opportunity for labour in a con-
 tract between master and servant or an employer and an appli-
 cant for work.

My Lords, in both cases which have been cited there are appeals to public interest. Yet the public interest in the one case may be on the side of freedom of contract, while on the other it is on the side of freedom of trade. The right to dispose for adequate consideration of a business which a person has built up and which has become solid, attractive, and valuable, by the exercise of his energy or ability, might become worthless unless accompanied by a substantial restraint of opposition on the part of the seller: and for the law to decline to support the restraint would be to impose a great obstacle to the enjoyment of the fruits of labour, and to destroy an incentive to industrial or commercial energy. The public interest might thus be grievously injured by such a restraint on freedom of contract.

But, upon the other side, the public interest may strongly coincide with freedom of trade. That might be gravely endangered or contravened by a restriction or impairment of the liberty of the subject to enter the ranks of business or of labour and work for and earn his living. My Lords, the law can achieve a reconciliation and adjustment of these two elementary liberties—the right to bargain and the right to work. And it has in fact achieved this in such a manner that the public interest has been in both cases conserved.

For the rule evolved after much discussion may now be considered settled. The language of Tindal C.J. in *Hitchcock v.*

Coker (1) can now no longer be questioned as being the law, that "where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." This was adopted by Parke B. in *Ward v. Byrne* (2), and is expressly founded upon by Lord Macnaghten in his analysis of the case law in *Nordenfelt*. (3) I cannot refrain from again quoting Lord Macnaghten's words: "The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

I have referred, my Lords, to the apparent antagonism between the right to bargain and the right to work. The extreme of the one destroys the other. But the public interest reconciles these two, and removes all antagonism by the establishment of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers

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(1) (1837) 6 Ad. & E. 438, at p. 454.

(2) 5 M. & W. 548.

(3) [1894] A. C. at p. 565.

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or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint. In such a case it may be "plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed." This is the language of Lord Campbell in *Tallis v. Tallis*. (1) For myself, I should not use the expression of an alternative, but I should prefer to say that when it is plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, then from that moment it is established that the public interest would be sacrificed.

I desire, my Lords, expressly to adopt for myself a further proposition bearing upon this subject, and enunciated by Farwell L.J. in *Sir W. C. Leng & Co. v. Andrews*. (2) The case that was there being dealt with, as at present, was a case of restraint upon a servant seeking fresh employment. Referring to the passage cited from Lord Macnaghten, he says: "That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learned in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction."

Upon this last point, my Lords, there was much argument at your Lordships' Bar as to whether this case did not fall within the principle of *Haynes v. Doman*. (3) But *Haynes v. Doman* (3) was a case, and was expressly so treated, of the divulging of trade secrets and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases, my Lords, are, in my opinion, widely distinguished from the other cases of an employee who, by faithful and industrious exercise of his powers, becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide as the psychological distinction between subjective and objective knowledge. But it is also as real. For, in the former

(1) (1858) 1 E. & B. 391, at p. 412. (2) [1909] 1 Ch. 763.

(3) [1899] 2 Ch. 13.

case, the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would, or might, be likely to induce the transfer of this to others, with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract between master and servant this distinction should be borne in mind.

Judged by these principles, the case on its facts becomes very simple. In the first place, has it been shewn that this restraint sought to be put upon the appellant was reasonable for the protection of the respondents? His period of service under the contract might have been only a fortnight, and the restraint, in all its comprehensiveness, as above mentioned, and for the same period of years—a restraint upon his liberty to earn his accustomed livelihood—would have been the same. In respect of that fortnight's employment, his bargain would have been to debar himself from all manner of service in the same class of trade for three years among a population of nearly six million souls. A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and would look upon as a reasonable protection of the employer. But to extend it from that to the wide range which I have set forth appears to me to be a thing under the guise of a contract which is not protection for the employer, but a means of coercing and punishing the workman and putting him under a tyrannous and, therefore, a legally indefensible restraint. No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause. It is to be noted that the respondents have tendered no evidence whatsoever that the clause was necessary for their protection. Their secretary was examined, and on that head all that he said was, "This is a breach of his agreement."

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Finally an attempt was made to bring the case by analogy within the principle of the trade secret cases. It appears, however, plainly, from the rules for canvassers, which are printed, that what is required is simply a fair share of intelligence and industry, with the accompaniment of a persuasive manner. If all these have been improved during the appellant's service with the respondents, they may assist his success in life, but they do not afford any materials for restraint by a Court of law upon his liberty in pursuing his ordinary calling. In my opinion, further, Courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms. There is no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate and clearly-defined divisions. It stands as a whole, and, in my opinion, it is not enforceable by law.

LORD MOULTON. My Lords, I concur. The law as to covenants in restraint of trade was so carefully and authoritatively formulated in this House in the *Nordenfelt Case* (1) that I do not think it necessary to discuss the numerous authorities cited in the course of the argument in order to ascertain what is the critical question which the Court ought to put to itself in such a case as this. It is as follows: Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?

The first task of the Court, therefore, is to ascertain with due particularity the nature of the master's business and of the servant's employment therein. The facts are not in dispute. The business of the respondents consists in inducing persons to become so-called "members," i.e., to subscribe for checks of various face values, say, for instance, of a value of 1*l.* These checks are paid for gradually by instalments at certain due dates, but they are delivered to the member when only a certain proportion of their face value has been paid by him, say, for instance, when 3*s.* has been paid on a 1*l.* check. So soon as the check is received it is available for purchasing goods to its full face

(1) [1894] A. C. 535.

value, the company being answerable to the vendor for the price of the goods purchased, and itself collecting the instalments payable by the member. A list of firms willing to sell goods on these terms is set out in a printed list given to the members, and is therefore a matter as to which there is no secrecy, and the profits of the company are derived from the discounts given to them by the vendors of the goods.

The nature of the employment of the appellant in this business was solely to obtain members and collect their instalments. A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was therefore that of a local canvasser and debt collector, and nothing more.

Such being the nature of the employment, it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand. If the servant is employed by a rival firm in some district which neither includes that in which he formerly worked for the respondents, nor is immediately adjoining thereto, there is no personal knowledge which he has acquired in his former master's service which can be used to that master's prejudice. The respondents would be in no different position from that in which they would be if the appellant had acquired his experience in the service of some other company carrying on a like business.

These, then, being the limits of the protection which the master might reasonably insist on, I turn to the covenant in order to see whether it exceeds these limits. That covenant is admittedly difficult to construe, and, moreover, it is, in my opinion, vague by reason of the extraordinary generality of the

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language employed. But at all events it prohibits the appellant from entering into a similar employment within twenty-five miles "of London in the county of Middlesex" for a period of three years after leaving the respondents' service. Such an area must include something like six million persons, that is to say, that on a moderate estimate it is an area a thousand times as great as the district assigned to him when in the respondents' service. Considering the strictly local character of the employment, I have no hesitation in saying that I should be prepared to hold that such an area is very far greater than could be reasonably required for the protection of his former employers.

But this is but a small portion of the restrictions imposed by the covenant. It is very arguable that it prohibits him entering into the employ of any one carrying on a similar business without any limitations of area. But assuming in favour of the respondents that we ought to give it the more limited construction which was evidently put upon it at the trial, and to which the evidence was directed, it restrains him for three years from entering into the employ of any firm which carries on a similar business within twenty-five miles of "London in the county of Middlesex," wherever it be that his employment is located. To my mind, the employment of the appellant is in respect of its local character analogous to a milk-walk, where the servant is employed in distributing his master's goods in a certain defined district and not otherwise, and the portion of the covenant with which I am now dealing would amount in the case of a man so employed to prohibiting him from entering into the service of any milk distributing company that had a place of business within twenty-five miles of his former milk-walk no matter where it was that they proposed to employ him.

But even now we have not exhausted the extravagances of this restrictive covenant. Under it the appellant must not for a like period "be engaged by or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or person, firm or firms, company or companies carrying on the same or a similar business as aforesaid, or who shall be assisting or helping either directly or indirectly in the carrying on of the same or a similar business."

It is difficult to construe with any certainty words which are so intentionally wide and general. I doubt whether a covenant that is so intentionally unreasonable merits even the benefit of the general rule of construction that a Court should, if possible, construe language so as to give a reasonable meaning to the document. But however we construe it, the covenant is out of all measure wider than anything that can reasonably be required for the protection of the respondents in their business, and therefore the covenant is void in law and will not be enforced by the Courts.

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It was suggested in the argument that even if the covenant was, as a whole, too wide, the Court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. My Lords, I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four Courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain every-

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thing which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences.

Lord Moulton.

I am of opinion, therefore, that the appeal should be allowed and the action dismissed, with all such costs as by the rules of the Courts are payable in the case of a defendant who, as in the present case, appeals in forma pauperis.

Order of the Court of Appeal reversed and judgment of the Divisional Court restored; the respondents to pay the costs in the Courts below; and also the costs of the appeal to this House, such costs to be taxed in the manner usual when an appellant sues in forma pauperis.

Lords' Journals, July 28, 1913.

Solicitors for appellant: *Langhams.*

Solicitors for respondents: *Jaques & Co., for J. Howison Richardson, Son & Fox, Bradford.*

[PRIVY COUNCIL.]

BRUNTON AND OTHERS APPELLANTS;

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AND

THE ACTING COMMISSIONER OF STAMP
 DUTIES FOR THE STATE OF NEW }
 SOUTH WALES } RESPONDENT.

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 June 20.

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

New South Wales Duties payable on Death—Special Power of Appointment—Aggregation of Estates—Rate at which Duty chargeable—Stamp Duties Act, 1898 (Act 27 of 1898), s. 49, sub-s. 2 (A) (a)—Probate Duties (Amendment) Act, 1899 (Act 45 of 1899), Schedule—New South Wales Stamp Duties (Amendment) Act, 1904 (Act 24 of 1904), s. 21.

The effect of the New South Wales Stamp Duties (Amendment) Act, 1904, s. 21, is not to provide for any aggregation of estates for the purpose of determining the rate at which duty is chargeable under the Stamp Duties Act, 1898, s. 49, as amended by the Probate Duties (Amendment) Act, 1899; the estate of the person dying is for the purpose of duty a separate estate, and similarly each estate chargeable under the Stamp Duties Act, 1898, s. 49, sub-s. 2, is for that purpose a separate estate.

APPEAL from an order of the Supreme Court (September 4, 1912) upon a special case stated by the Acting Commissioner for Stamp Duties for New South Wales.

The case was stated under the Stamp Duties Act, 1898, s. 18, and the Stamp Duties (Amendment) Act, 1904, s. 22 (c), both Acts of New South Wales, and was to the following effect:—

1. The testatrix, Mary Ann Thorne, died on August 7, 1911, leaving a will probate whereof was on September 13, 1911, granted to John Spencer Brunton, Alexander Robert Minter, and James Ambrose Thompson (the present appellants).

2. The estate of which the said testatrix died possessed was for the purposes of the above-named Acts valued at 15,430*l.* 2*s.* 7*d.*

3. In addition to the said last-mentioned estate the testatrix was entitled under and by virtue of the will of William Moffitt,

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD MOULTON, LORD PARKER OF WADDINGTON, and SIR SAMUEL GRIFFITH.

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deceased, to a power of appointment by will over certain real and personal property amongst her children and grandchildren, or amongst the children and grandchildren of her two sisters, or amongst the children of her nephew, in such shares and proportions as she might think proper.

4. By her said will the testatrix duly exercised her said power of appointment.

5. The net value of the estate the subject of the said power of appointment so exercised as aforesaid was 181,085*l.* 9*s.* 11*d.*

6. The Commissioner assessed the duty payable by the said executors in respect of the aggregate value of the estate so devised and bequeathed and the estate so appointed as aforesaid by the will of the said testatrix (such aggregate value being 196,515*l.* 12*s.* 6*d.*) at the sum of 19,651*l.* 12*s.*, being at the rate of 10*l.* per centum as provided by the schedule to the Probate Duties (Amendment) Act, 1899, in the case of estates whose total value is over 100,000*l.*

7. The said executors claim that for the purpose of assessing the duty on the said sum of 15,430*l.* 2*s.* 7*d.* there should be no such aggregation as aforesaid, and that duty is payable on such sum only at the rate prescribed by the schedule to the said Act on estates of that value, namely, $4\frac{2}{3}$ per centum upon that part of the estate which under the said will passed to persons other than children and grandchildren of the deceased, and $2\frac{1}{2}$ per centum on that part of the estate which passed to the children and grandchildren of the said testatrix. Such claim by the executors represents a reduction on the Commissioner's said assessment amounting to 1190*l.* 11*s.* 2*d.*

8. The said executors have paid under protest the said sum of 19,651*l.* 12*s.*, being the whole amount of the duty so assessed by the Commissioner as aforesaid, and have required the Commissioner to state and sign a case setting forth the grounds upon which his assessment was made.

9. The questions for the determination of this Court are :

(a) Whether the estate of which the deceased died possessed is to be aggregated with the estate the subject of the said power of appointment for the purposes of the said Acts including the assessment and payment of the said duty.

(b) What is the amount of the duty chargeable under the said Acts in respect of the said sum of 15,430*l.* 2*s.* 7*d.*

(c) How the costs of this special case are to be borne and paid.

The Supreme Court, after hearing argument, made an order on September 4, 1912, that the first question in the case be answered in the affirmative and that the second question be answered by declaring that duty at the rate of 10 per cent. was chargeable in respect of the above sum of 15,430*l.* 2*s.* 7*d.*, and that the costs should be paid by the appellant.

The question raised by the case and the appeal was whether upon the true construction of the Stamp Duties (Amendment) Act, 1904, ss. 20, 21 (a), (1) the estate over which the testatrix had exercised a special power of appointment was or was not to be added to her own estate for the purpose of ascertaining the rate per cent. at which the duty was payable upon the latter under the Stamp Duties Act, 1898, as amended by the Probate Duties (Amendment) Act, 1899. (1)

(1) The Stamp Duties Act, 1898, provides:—

Sect. 49, sub-s. 1: "The duties to be levied collected and paid as aforesaid upon the estates of deceased persons shall be according to the duties mentioned in the Third Schedule to this Act; and such duties shall be charged and chargeable upon and in respect of all estate whether real or personal which belonged to any testator or intestate dying after the commencement of this Act."

Sub-s. 2: "Duties to be levied collected and paid according to the duties mentioned in the said Third Schedule shall also be charged and chargeable upon and in respect of—

"(A) All estate whether real or personal—

"(a) which any person dying after 22nd May, 1894, has disposed of whether before or after that date by

will or by settlement containing any trust in respect of that estate to take effect after his death under any authority enabling that person to dispose of the same by will or deed as the case may be;"

The Probate Duties (Amendment) Act, 1899, substitutes for the graduated scale of duties contained in the Third Schedule of the Act of 1898 an amended graduated scale and makes provision for a reduction of the rate of duty in the case of property disposed of for the benefit of children and grandchildren where the total estate is less than 50,000*l.* (reduced by s. 24 of Act 24 of 1904 to 30,000*l.*).

The Stamp Duties (Amendment) Act, 1904, provides:—

Sect. 20: "Paragraph (A) of subsection two of section forty-nine of the principal Act" (i.e., the said

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Martelli, K.C., and *Percy Wheeler*, for the appellants. On the true construction of the statutes the amount of the fund over which the special power was exercised should not be added to the value of the property of the testatrix for the purpose of determining the rate at which duty is chargeable upon her estate. There is nothing in the Act of 1898 which can be held to have introduced the principle of aggregation. If that principle has been introduced by the Legislature it must be by the Act of 1904. That Act was passed in consequence of the decision in *Commissioner of Stamp Duties v. Stephen* (1), that s. 49, sub-s. 2 (A) (a), of the Act of 1898 did not extend to a special as distinguished from a general power of appointment. The object of the Act of 1904 was twofold—first, to extend the Act of 1898 to special powers; secondly, to provide that the duty chargeable under s. 49, sub-s. 2 (A) (a) and (b), of the Act of 1898 so extended should in the first instance be payable by the executors. An increase in the burden of the tax of so important a character should not be read into s. 21, in the absence of clear and unambiguous language: *Oriental Bank Corporation v. Wright* (2); *Simms v. Registrar of Probates*. (3) For instance, when the Legislature intended by the Finance Act, 1894, to introduce aggregation it did so, by s. 4, in direct terms. It is for the purpose of making the duty chargeable under s. 49, sub-s. 2 (A) (a), of the Act of 1898

Stamp Duties Act, 1898) "shall be deemed to have extended and shall extend to the case where the authority under which the disposal was made was a special or limited power of appointment; Provided that nothing in this section shall affect any suit or action pending at the commencement of this Act."

Sect. 21: "Where, under paragraph (A) . . . of sub-section two of section forty-nine of the principal Act, as amended by the Probate Duties (Amendment) Act, 1899, duty is payable in respect of a disposal by will, settlement or voluntary disposition of any estate—

"(a) such estate shall, for the

purposes of those Acts, be deemed to be the estate of the person dying;

"(b) the duty shall be payable by the executor or administrator of the said person;

"(c) the duty shall be a charge upon the estate, and shall be paid thereout by the trustees or owners thereof according to the value of their respective interests therein to the executor or administrator."

(1) [1904] A. C. 137.

(2) (1880) 5 App. Cas. 842.

(3) [1900] A. C. 323.

recoverable from the executors that s. 21 (a) of the Act of 1904 provides that the estate "shall be deemed to be the estate of the person dying." Had the intention been that contended for by the respondent the section would have provided that the estate should be deemed "part of the estate of the person dying," which expression is used in s. 52 of the Act of 1898. Upon the true construction of s. 21 (a) the estate over which the special power is exercised is to be treated as a separate estate, but fictitiously as though it were the testator's estate. If the estates are to be aggregated the effect would be not only to raise the rate at which duty is payable on the testatrix's property, but also to take away the benefits provided by the Probate Duties (Amendment) Act, 1899, in respect of property devised to children and grandchildren. In the absence of express words the statute should not be so construed.

Sir Robert Finlay, K.C., and *Austen-Cartmell*, for the respondent. The principle of aggregation was applied in New South Wales in practice before the Act of 1904. This appears from the form of affidavit as prescribed by the Regulations made under the Act of 1898 and published in the *New South Wales Gazette*, February 23, 1900, at p. 1605. It was consequently not necessary in the Act of 1904 to provide expressly that the principle already existing should apply. The judgment in *Commissioner of Stamps v. Stephen* (1) implies that if it had been a general power the estates would have been aggregated. In *Dent v. Commissioner of Stamps* (2), in which the Supreme Court considered the effect of s. 22 (f) of the Act of 1904, the wording of that sub-section was contrasted with the wording of s. 21 (a), and the latter sub-section was interpreted as meaning that property passing under a special power was to be deemed part of the estate of the person dying for all the purposes of the Acts, including the determination of the rate at which duty was payable upon the property of the person dying. The decision in *Heward v. Rex* (3) also supports the respondent's contention.

Martelli, K.C., in reply. In *Dent's Case* (2) and *Heward's*

(1) [1904] A. C. at p. 143.

(2) (1909) 9 C. L. R. 406.

(3) (1905) 3 C. L. R. 117.

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Case (1) the Court was not directly considering the true construction of s. 21 (*a*), but of s. 22 (*f*), and the passages relied on in those judgments are obiter. Sect. 22 deals with dispositions of property many of which might be regarded as devices by a testator to avoid payment of duty, and it cannot be that the Legislature intended that the duty on the property of a testator exercising a special power of appointment should be thereby increased while it should be unaffected by a disposition coming under s. 22. The decisions in *Dent's Case* (2) and in *Heward's Case* (1) are consequently in favour of the appellants' contention.

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The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The result of this appeal depends upon the true meaning and effect of s. 21 of the New South Wales statute No. 24 of 1904, the short title of which is the Stamp Duties (Amendment) Act, 1904.

The material facts are as follows: Mary Ann Thorne died on August 7, 1911. The estate belonging to her at the time of her death was of the value of 15,480*l.* 2*s.* 7*d.*, but besides this estate she had under the will of one William Moffitt a special power of testamentary appointment over property of the value of 181,085*l.* 9*s.* 11*d.* This power she exercised by her will. On her death duty became payable under the Stamp Duties Act, 1898, as amended by the Probate Duties (Amendment) Act, 1899, and the Stamp Duties (Amendment) Act, 1904, in respect of (1.) the estate belonging to her at her death and (2.) the estate over which she exercised her special testamentary power. The Commissioner of Stamp Duties for the State of New South Wales thereupon claimed that the rate of duty payable in respect of the estate belonging to her at her death must be determined not by reference to the value of such estate, but by reference to the aggregate value of such estate and the estate over which she exercised her special testamentary power. The Supreme Court of New South Wales, by order dated September 4, 1912, upheld this contention, and the executors of Mary Anne Thorne are appealing from this order. The actual amount involved in the question their Lordships have to determine is 1190*l.* 11*s.* 2*d.*

The Stamp Duties Act, 1898, the full title of which is "An Act to consolidate the Laws relating to Stamp Duties," deals with a variety of matters, but for the purposes of this appeal it is only necessary to refer to Part III. thereof, comprising ss. 49 to 59 inclusive. It is provided by s. 49, sub-s. 1, that the duties to be levied upon the estates of deceased persons shall be according to the duties mentioned in the Third Schedule to the Act, and that such duties shall be charged and chargeable upon all estate, whether real or personal, which belonged to any testator or intestate dying after the commencement of the Act. A reference to this schedule shews that the rate of duty is to be determined by the value of the real and personal estate of the deceased in respect of which there is a grant of probate or letters of administration. Sect. 49, sub-s. 2, provides that duties to be levied according to the duties mentioned in the Third Schedule shall also be charged and chargeable upon certain other estates enumerated under the headings A and B. The heading A includes the following:—(a) All estate which any person dying after May 22, 1894, has disposed of either before or after that date by will or settlement creating any trust in respect of that estate to take effect after his death under any authority enabling that person to dispose of the same by deed or will; (b) all estate taken under a voluntary disposition made by such person after May 22, 1894, but not bona fide made within twelve months before the death of such person; (c) all estate which such person being absolutely entitled thereto has transferred into the joint names of himself and any other person so that some beneficial interest passes or accrues by survivorship on his death; (d) all estate purchased or invested by such person in the joint names of himself and any other person so that some beneficial interest passes or accrues by survivorship on his death; and (e) all estate passing under any voluntary settlement made by such person by instrument (other than a will) whereby an interest for life or any period determinable by reference to death is reserved to the settlor or whereby the settlor has reserved the right by the exercise of any power to restore to himself or reclaim the absolute interest in the settled property. The heading B includes all personal estate (not being chattels real) taken under any gift

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whenever made by such person of which bona fide possession has not been assumed by the donee immediately upon the gift and not thenceforward retained to the exclusion of any benefit to the donor whether by contract or otherwise. Under the Third Schedule to the Act the rate of duty is determined according to the value of the estate chargeable therewith.

It is in their Lordships' opinion reasonably clear that according to the true construction of the Stamp Duties Act, 1898, every estate on which duty is chargeable must for the purpose of determining the rate of duty be treated as an estate in itself and not aggregated with any other estate. This construction was not seriously disputed by counsel for the respondent and is corroborated by reference to the previous Acts which the Act of 1898 was intended to consolidate, and also, as will appear presently, by the Probate Duties (Amendment) Act, 1899. The only trace which their Lordships can find in the Act of 1898 of any aggregation for the purpose of determining the rate of duty is in s. 52, in the case of conveyances or gifts made with intent to evade the payment of duty and of donations mortis causa; and here there are express provisions that the subject of every such conveyance, gift, or donation mortis causa is to be deemed part of the estate or property of the deceased and the duty thereon recovered on that footing.

Further, an examination of the subsequent sections of Part III. of the Act of 1898 will shew that the Act contains no provision for the assessment or collection of the duties charged under s. 49, sub-s. 2. All those sections, with the exception of s. 58, relate to the assessment and collection of duty on the estates real and personal of deceased persons, including the subject-matter of gifts made with the intention of evading duties and of donations mortis causa, while s. 58 relates to the assessment and payment of the duty thereby charged on property of which the deceased has executed a settlement containing any trust to take effect after his death, property which, if the settlement were voluntary and the settlor had reserved a life interest, would appear to be already charged with duty by s. 49, sub-s. 2 (A) (c). This is no doubt accounted for by the fact that s. 52 is a re-enactment of a clause contained in the statute No. 3 of 1880, whereas

s. 49, sub-s. 2, is a re-enactment of the later statute No. 20 of 1894.

The Act of 1898 was followed by the Probate Duties (Amendment) Act, 1899, which provides (s. 1, sub-s. 1) that where under Part III. of the Act of 1898 duties are chargeable upon the estates of any persons dying after the commencement of the Act, or upon estates the subject of any settlement, trust, disposition, conveyance, transfer, vesting, purchase, investment or gift made after the commencement of the Act by any person so dying, such duties shall be levied according to the duties mentioned in the schedule to the Act. The schedule provides for duties the rate of which varies with "the total value of the estate," which in their Lordships' opinion means the total value of each estate chargeable, and not the total value of all the estates chargeable. It would be against all sound principles of construction to infer from an ambiguous phrase in the schedule the intention of aggregating estates for the purpose of determining the rate of duty, and such aggregation would involve various anomalies in the application of s. 1, sub-s. 2, the object of which is to grant partial relief from duty to the widow, children, and grandchildren of the deceased. It was not indeed contended that the Act of 1899 introduced any principle of aggregation.

In the year 1903 the case of *Commissioner of Stamp Duties for New South Wales v. Stephen* (1) came before their Lordships' Board. A Mrs. O'Connell had died in 1901, leaving a will by which she disposed of her own property and by which also she exercised a special testamentary power conferred on her by her marriage settlement. The Commissioner of Stamp Duties insisted that the executor must pay the duty charged by s. 49, sub-s. 2 (A) (a), of the Act of 1898 on the appointed property before probate was granted. The Court below held that this was not so, because the Act of 1898 did not make the executor liable for the duty in question. Their Lordships' Board affirmed the decision of the Court below, but on the ground that s. 49, sub-s. 2 (A) (a), did not apply at all to property appointed under a special power, but only to property appointed under general powers of appointment. The judgment of the Board

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was delivered by Lord Lindley, and counsel in the present case laid considerable stress on certain expressions contained therein. In their Lordships' opinion there is nothing in Lord Lindley's judgment which indicates in any way that the question of aggregating two or more estates for the purpose of ascertaining the rate of duty was present to his mind, or that he considered that according to the true construction of the Act of 1898 the executor was responsible for the payment of the duties chargeable under s. 49, sub-s. 2, of that Act, except possibly the duty on property appointed by will under a general power, in which case such property would for certain purposes be assets of the testator. After the decision, however, two points were quite clear, (1.) that s. 49, sub-s. 2 (A) (a), of the Act of 1898 did not apply to property appointed under a special power, and (2.) that no machinery was provided by the Act of 1898 for the assessment and collection of the duties chargeable under s. 49, sub-s. 2, except possibly property appointed by will under a general power.

It was under these circumstances that the Legislature of New South Wales passed the Stamp Duties (Amendment) Act, 1904, upon the true construction of which this appeal depends. Their Lordships are concerned only with ss. 20, 21, and 22 of this Act. Sect. 20 provides that s. 49, sub-s. 2 (A) (a), of the Act of 1898 shall be deemed to have extended and shall extend to property appointed under a special power. In other words it in effect reverses the ultimate decision in the case of *Commissioner of Stamps for New South Wales v. Stephen*. (1) Sects. 21 and 22 at any rate provide machinery for the assessment and collection of all the duties chargeable under s. 49, sub-s. 2, of the Act of 1898; in other words they are clearly designed to remedy the defect in the Act of 1898 above referred to. The question is whether they go beyond this and increase the duties imposed by the Act of 1898 by introducing the principle of aggregating two or more estates for the purpose of ascertaining the rate of duty chargeable. To answer this question the exact wording of the sections requires careful examination.

Sect. 21 deals with the duties payable under s. 49, sub-s. 2 (A) (a)

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or (b), of the Act of 1898 as amended by the Act of 1899. It provides that where such duty is payable in respect of a disposal by will, settlement, or voluntary disposition of any estate, (a) such estate shall for the purposes of the Acts of 1898 and 1899 be deemed to be the estate of the person dying; (b) the duty shall be payable by the executor or administrator of the person dying; and (c) the duty shall be a charge on the estate and shall be paid thereout by the trustees or owners thereof according to the value of their respective interests to the executor or administrator. The expressions "such estate" in sub-s. (a) and "the estate" in sub-s. (c) clearly mean the particular estate chargeable, whether the subject of a disposal by will, settlement, or voluntary disposition, and the expression "the duty" in sub-ss. (b) and (c) clearly means the duty payable under the Act of 1898 as amended by the Act of 1899 in respect of such particular estate. By sub-s. (a) the particular estate is for the purposes of the Acts of 1898 and 1899 to be deemed the personal estate of the person dying, and it is argued that these words are wide enough to introduce the principle of aggregation for the purpose of determining the rate of duty. On the other hand, if the Legislature had been contemplating any alteration in the rate of duty, one would have expected the section to be worded in such a way as to shew clearly (1.) that "the duty" meant "the duty payable under the Act of 1898 as amended by the Act of 1899 and the Act of 1904," and not "the duty payable under the Act of 1898 as amended by the Act of 1899" only; (2.) that "the duty" meant the duty on the personal estate increased by the estates to be aggregated for ascertaining its rate; and (3.) that the duty charged on the particular estate was not the whole duty but a proper proportion of the duty. One would also have expected sub-s. (a) to provide that the particular estate should be deemed to be "part of the estate of the person dying" as in s. 52 of the Act of 1898, and not "the estate of the person dying." The Act of 1898 (s. 9) had made a distinction between "estate which belonged to" the person dying and other property also made liable to duty. The Act of 1899 (s. 1) had repeated the distinction in slightly different language, but the rate of duty upon both classes of property was equal. For other

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purposes, however, as has been shewn, the distinction between the two classes was material. When, therefore, it was provided by s. 21 that the estate mentioned in that section should be "deemed" the estate of the person dying, the natural construction would seem to be that the property mentioned, although not in fact his estate, shall be deemed to be so for all purposes for which the quality artificially attributed to it is material, but not for any other purpose. And if the clear object of the section be (as it seems to be) to provide for the assessment and collection of duties already imposed and not to increase such duties, there would be little difficulty in limiting the generality of the expression by reference to the object in view.

Passing to s. 22 it will be found to deal with every other duty payable under s. 49, sub-s. 2, of the Act of 1898 as amended by the Act of 1899, except those already dealt with by s. 21. It provides in sub-ss. (a), (b), (c), and (d) machinery for the assessment and collection of the duty in every case. Such duty is by sub-s. (e) charged on the estate, which again means the particular estate chargeable. Then comes the important sub-s. (f), which provides that for the purpose of assessing the amount of the duty the estate (that is, the particular estate chargeable) shall be deemed to be the estate of the person dying. It was argued that this sub-section can have no meaning at all unless it means that for the purpose of determining the rate of duty the particular estate is to be aggregated with the estate of the deceased person. In their Lordships' opinion this is not so. Even if it be impossible to point to any particular section of the Act of 1898 which is by this sub-section brought into operation for the purpose of assessing the duty there referred to, the sub-section itself might have an important effect in determining whether any particular item forming part of the estate chargeable with duty ought, having regard to questions of domicil and local situation, to be disregarded for the purpose of the assessment, and upon a question of this sort s. 52 of the Act of 1898 is not altogether immaterial. As, therefore, in the case of s. 21, so also in the case of s. 22, the words are wide enough to introduce the principle of aggregation, though a rational meaning can be assigned to them without reference to such introduction. On

the other hand, as in the case of s. 21, so also in the case of s. 22, one would not have expected this section to be worded as it is in fact worded had the Legislature been intending to introduce any principle of aggregation for the purpose of determining the rate of duty.

Where in a statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail. In the present case if ss. 21 and 22 be held to have introduced the principle of aggregation for the purpose of determining the rate of duty, then under s. 21 the testator's own estate would have to be aggregated with any estate chargeable with duty under s. 49, sub-s. 2 (A) (a) or (b), for the purpose of determining the rate of duty on all these estates. On the other hand, under s. 22 the testator's own estate would have to be aggregated with each of the other estates with which that section deals for the purpose only of determining the rate of duty on each such other estate. There would be no aggregation of the various estates with which the section deals for the purpose of determining the rate of duty on any of them, nor would there be any aggregation of any of them with the estates dealt with by s. 21 for any purpose whatever. These results would be curious, if not anomalous; and further, if in s. 21 (a) the words "for the purposes of those Acts" mean for all the purposes of those Acts, the relief granted by the Act of 1899 for the benefit of widows, children, and grandchildren of a deceased person might incidentally be wholly abrogated. Suppose, for example, a testator by his will gave all his own property, worth, say, 10,000*l.*, to his widow and children and at the same time exercised a special testamentary power over property worth 100,000*l.* in favour of persons not being his widow, children, or grandchildren, then, inasmuch as the latter property would have for the purposes of the Act of 1899 to be treated as the testator's estate, the widow and children would be totally deprived of the relief intended for them. There is no indication in the Act that any such result was intended, and the result itself is so strange that the Court may well hesitate in construing the doubtful words of the statute in such a way as to bring it about.

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Lastly, the intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shewn by clear and unambiguous language and cannot be inferred from ambiguous words: see the cases of *Oriental Bank Corporation v. Wright* (1) and *Simms v. Registrar of Probates*. (2)

Their Lordships therefore have come to the conclusion that neither s. 21 nor s. 22 of the Act of 1904 provides for any aggregation of estates for the purpose of determining the rate of duty. They are of opinion that both these sections were intended to provide machinery for the assessment and collection of the duties payable under the earlier Acts and not to increase such duties or vary the rate at which they are calculated. As before, so after the Act of 1904, the estate of the testator or intestate is, for the purpose of duty, a separate estate, and similarly each estate chargeable under s. 49, sub-s. 2, is for the purpose of duty a separate estate. The Act of 1904 does not provide for any aggregation for the purpose of determining the rate of duty on estates which, before the Act, were treated as separate estates for that purpose.

Their Lordships will therefore humbly advise His Majesty to allow the appeal with costs here and below.

Solicitor for appellants: *C. F. Martelli*.

Solicitors for respondent: *Light & Fulton*.

(1) 5 App. Cas. 842.

(2) [1900] A. C. 323.

[PRIVY COUNCIL.]

MANU KAPUA AND OTHERS	APPELLANTS ;	J. C.*
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PARA HAIMONA AND ANOTHER	RESPONDENTS.	June 10, 11 ; July 1.

ON APPEAL FROM THE NATIVE APPELLATE COURT OF
NEW ZEALAND.

*New Zealand Settlement Act, 1863 (27 Vict. No. 8)—Order in Council—Native
Titles to Land.*

By the New Zealand Settlement Act, 1863, s. 3, the Governor in Council was empowered to "set apart" within any district, declared under s. 2 to be a district within that Act, "eligible sites for settlements for colonization." Sect. 4 provided: "for the purposes of such settlements the Governor in Council may from time to time reserve or take any land within such district and such land shall be deemed to be Crown land, freed and discharged from all title, interest or claim of any person whomsoever." By an Order in Council dated September 2, 1865, made under the above Act, it was declared that certain lands should be a district within the above Act and that the said lands were required for the purposes of the Act and were subject to the provisions thereof; and it ordered that such lands should be "set apart and reserved as sites for settlements for colonization agreeably to the provisions of the Act." The Order further declared, "no land of any loyal inhabitant within the district, whether held by native custom or Crown grant, will be taken, except so much as may be absolutely necessary for the security of the country, compensation being given for all lands so taken":—

Held, that the above Order in Council did not extinguish the native or other title of any loyal inhabitant of the district.

Te Teira Te Paea v. Te Roera Tareha [1902] A. C. 56, distinguished.

APPEAL from a judgment of the Native Appellate Court of New Zealand (February 27, 1907) and a partition order (April 17, 1907) made thereon.

The appeal was as to the title to 11,236 acres of land in New Zealand known as the Te Akau block, and involved the determination of the effect in law of an Order in Council dated September 2, 1865, made under the New Zealand Settlements Act, 1863. The appellants, who relied on the decision in *Te Teira Te Paea*

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD DE VILLIERS, LORD MOULTON, and SIR SAMUEL GRIFFITH.

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v. *Te Roera Tareha* (1), contended that the effect of this Order was to extinguish all native title in the whole of the land to which it referred; the respondents contended that it did not extinguish the native title of any loyal inhabitant. The facts, which were agreed between the parties, are fully stated in the judgment of their Lordships. The Native Appellate Court, before whom the question of the partition of the Te Akau block came, by their judgment delivered February 27, 1907, held that the native take or custom with regard to the lands in dispute was not extinguished by the Order in Council.

H. S. Preston and *Wynyard*, for the appellants. The finding of the Native Appellate Court that the ancient tribal rights to the land in dispute were not extinguished by the Order in Council of September 2, 1865, was erroneous, and as this finding is the basis of the judgment appealed from, the whole partition proceeded on a wrong principle. The case is not properly distinguishable from *Te Teira Te Paea* v. *Te Roera Tareha*. (1) It is not material that the Order in Council in the present case did not declare that the whole land should be "taken," since it declared that the lands should be "reserved as sites for settlements for colonization." The declaration that no land of any loyal inhabitant would be "taken" does not prevent the whole of the land referred to in the Order being deemed to be Crown land freed from all other title as provided by s. 4 of the Act. The effect is the same as if the word "retained" had been used as it was in the above cited decision.

Salmond, K.C. (*S.-G. for New Zealand*), and *Northcote*, for the respondents, were not called upon.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This is an appeal from a judgment of the Native Appellate Court of New Zealand and from a partition order which followed on the judgment, by which order directions were given for the partition of a block of land, known as Te Akau, between two tribes of natives by whom the land was held in common ownership. The two tribes are known as the

(1) [1902] A. C. 56.

Tainuis and the Tahingas, and the appeal is brought by or on behalf of the former against the latter. The Attorney-General of New Zealand has been made a respondent because, since the date of the judgment, which was given in 1907, the land awarded to the Tahingas has been purchased from them by the Crown. The area in dispute is one of some 11,236 acres. The facts have been agreed and stated in a special case settled between the parties for the purpose of this appeal, and it has been further agreed that the appeal is to be confined to questions of law only.

The history of the case is as follows. In 1863 the natives of New Zealand were in armed rebellion. Among other steps taken to bring the rebellion to an end the New Zealand Settlements Act, 1863, was passed. By s. 2 of this Act the Governor in Council was empowered to declare that any district within which there was situated land which was the property or in the possession of natives who had been in rebellion since the beginning of the year 1863 should be a district within the provisions of the Act. He was further empowered to define and vary the boundaries of such a district. By s. 3 the Governor in Council was further empowered to set apart within any such district eligible sites for settlements for colonization, and to define and vary their boundaries. By s. 4 a third power was conferred on the Governor in Council. He was enabled from time to time to reserve or take any land within such a district for the purposes of such settlements, and such land was to be deemed to be Crown land, freed and discharged from all title, interest or claim of any person whomsoever, as soon as the Governor in Council had declared such land to be required for the purposes of the Act and to be subject to its provisions. Sect. 5 contained provisions for compensating persons who should have any title, interest or claim to any land taken under the Act, exclusive of persons who had been concerned in the rebellion. Sect. 8 established a Compensation Court.

By an amending Act of 1865 certain alterations were made in these compensation provisions, and power was taken to make agreements for giving land instead of money*.

Orders in Council were made under the Act of 1863 by the Governor in 1865. By one of these, dated May 16, 1865 the

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Governor declared certain territory, of which the Te Akau block, which is the subject of this appeal, formed part, to be a district within the provisions of the Act of 1863. By another Order in Council, dated September 2, 1865, he declared that territory, including what had come under the provisions of the earlier Order, which comprised the Te Akau block, should be a district within the provisions of the Act. He further declared that these lands were required for the purposes of the Act, and were subject to the provisions thereof, and he ordered that such lands should be "set apart and reserved as sites for settlements for colonization agreeably to the provisions of the Act." The Order, however, went on to qualify this by providing that "no land of any loyal inhabitant within the said district, whether held by native custom or under Crown grant, will be taken, except so much as may be absolutely necessary for the security of the country, compensation being given for all land so taken; and, further, that all rebel inhabitants of the said district who come in within a reasonable time and make submission to the Queen will receive a sufficient quantity of land within the said district under grant from the Crown."

It was argued for the appellants that the effect of this Order in Council was to extinguish all native title in the whole of the land referred to, and reliance was placed on the decision of this Board in the case of *Te Teira Te Paea v. Te Roera Tareha* (1), where it was held that an Order in Council made under the Act had this result. But in that case the wording of the particular Order in Council differed materially from the wording in the present case. Here, although the land is "set apart and reserved as sites for settlement and colonization," the declaration which immediately follows shews that this was a proceeding which was not to become operative so far as the land of loyal inhabitants was concerned. In the case relied on, the words of the Order were not "set apart and reserved," but "reserved and taken," and although there was a qualifying declaration as to loyal inhabitants, it was simply that their land would not be "retained by the Government." Their Lordships are of opinion that the Order in Council of September 2, 1865, did not extinguish

the native or other title of any loyal inhabitant. In so holding, they agree with the judgment under review on what, for reasons which will appear, they consider to be the only question of law that arises in the appeal.

In 1866 a Compensation Court sat under the provisions of the Act of 1863 and the amending Act, to investigate claims by loyal natives in respect of the district referred to. The loyal male members of the appellant and respondent tribes made claims in regard to an area of about 158,000 acres forming part of the territory dealt with by the Orders in Council.

This area included the Te Akau block. Upon investigation it was held by the Court that there were seventy-seven loyal and forty-four rebel male natives interested in the area. Although according to Maori custom the rights of women in tribal lands are not less than the rights of men, no women appear to have claimed, and in the result no claims of women were investigated or recognized. An arrangement was come to and approved by the Court that the loyal natives should receive 94,663 acres out of the area.

On June 30, 1869, the agent of the Crown, Mr. James Mackay, gave a certificate for the issue of a Crown grant of these acres to fourteen of the loyal natives in trust for the others. The grant was, however, not then issued because, as the result of negotiations with the authorities, the number of grantees was increased from seventy-seven to eighty-eight. On October 23, 1874, a Crown grant of the Te Akau block was made to these eighty-eight natives, all claiming as male members of the appellant and respondent tribes, with the exception of one Honana Maioha, who belonged to another tribe. Prior to the grant and the antecedent proceedings the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy. The grant was expressed to be made to the eighty-eight grantees classified according to their tribes, to hold as tenants in common, but with a declaration that their estates or interests were not to be deemed to be equal or of an equal value.

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In 1891 the Native Land Court ordered a partition of the block into nineteen parcels and determined the relative interests of the respective owners. In 1893, on the application of the Tainuis, a rehearing of these partition proceedings was directed. The rehearing took place in 1894 before Judge O'Brien and Judge von Stürmer, and, as the result, the block was ordered to be divided into three parts. One of these, consisting of 600 acres, was awarded to Honana Maioha, already mentioned; another, comprising 28,152 acres, was awarded to the Tainuis; and a third, comprising 61,608 acres, was awarded to the Tahingas. The order took no account of any ancient tribal boundary between the two tribes, but proceeded on the footing of dividing the block between the members of the appellant and respondent tribes irrespective of the original extent or boundaries of these tribes, and of giving equal shares to the grantees who were of full tribal blood, and smaller shares to grantees who were not of full blood. The shape of the original block of 158,000 acres was roughly rectangular, one boundary being the sea coast, and the whole block was owned by the two tribes, the tribal boundary, as was found later on by the judgment now appealed from, running inland approximately at right angles to the coast, at least as far as the eastern boundary of the land comprised in the Crown grant. The Te Akau block, which was the subject of the partition order made by the Native Land Court in 1894, was that portion of the 158,000 acres which lay upon the sea coast, the inland portion having been retained by the Crown.

The judgment of 1894 made no reference to any question of tribal boundary, and appears to have proceeded on the assumption that the Crown grant of 1874 had been made without reference to any previous native title or tribal boundary. If the effect of the Order in Council of September 2, 1865, had been to extinguish the title of the loyal natives this might well have been so. But, as their Lordships have already stated, they do not consider that the Order disturbed the rights in the land of the loyal members of the two tribes. It follows that the grant only did what such grants are often used to accomplish in such transactions in New Zealand. It appears simply to have conveyed the legal estate out of the Crown and transformed the native customary title into

a freehold title, the relative interests of the grantees remaining equivalent in value and extent to what they were before. Petitions were presented to the New Zealand Parliament complaining of the partition of 1894, and in 1904 the Government appointed a Commission to investigate the question. In June, 1904, after taking evidence, the Commission reported that the partition order should be varied. The effect of the partition order had been to award to the Tainuis not only their own land as occupied and owned by them prior to the Order in Council of 1865, but in addition 11,236 acres lying to the northward of what was said to have been then the tribal boundary, and forming part of the land occupied and owned by the Tahingas. This is the territory in dispute in the present proceedings. The Commission recommended that these 11,236 acres should be restored to the Tahingas, on the footing that the proper mode of partitioning the Te Akau block was to adopt as the line of division the ancient ancestral boundary which had divided the territories of the two tribes. An Act was in consequence passed in 1904, under the title of the Maori Land Claims Adjustment and Laws Amendment Act of that year, which directed that the matter should be referred to the Chief Judge of the Native Land Court to inquire in open Court, with power to confirm or disallow or vary the recommendations of the Commission.

The Chief Judge held the inquiry directed by the statute, and in April, 1905, delivered judgment declining to give effect to the recommendations of the Commission, and confirming the partition made in 1894. The fundamental point in his reasoning was that he considered the native title to have been extinguished by the Order in Council of September 2, 1865, and that the recommendations of the Commission, which proceeded on a contrary assumption, were therefore vitiated. He stated that in his opinion the boundary line proposed by the Commission was arbitrary and inapplicable to the actual circumstances, and was probably wrong. He therefore in effect confirmed the partition made in 1894. For reasons already given their Lordships are unable to agree with the fundamental assumption of the Chief Judge's conclusions.

In 1906 the New Zealand Parliament again took the matter

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up, and passed the Maori Land Claims Adjustment and Laws Amendment Act of that year. By s. 26 a further inquiry was directed to be undertaken by the Native Appellate Court. This section confers the statutory authority under which the judgment now appealed from was delivered, and its terms are important. They are as follows: "The Appellate Court is hereby authorised and directed to review the Report of the Royal Commission in connection with disputes affecting the title of the Te Akau block" "and the subsequent decisions of the Chief Judge under the provisions of section 14 of the Maori Land Claims Adjustment and Laws Amendment Act, 1904, thereon, in so far as questions in dispute between the native owners as to tribal or hapu boundaries are concerned, and to confirm or if necessary amend in accordance with the equities of the case any order heretofore made by the Court, the Appellate Court, or the Chief Judge." In February, 1907, in accordance with this enactment, the Native Court, consisting of Judge Brown and Judge Mair, reconsidered the question of the partition. No fresh evidence was taken, but counsel were heard on behalf of the Tainuis and the Tahingas, and the record of the evidence on previous hearings and other records and documents were before the Court. Judgment was given on February 27, 1907, and this is the judgment now appealed from. By this judgment the 11,236 acres were taken from the Tainuis and restored to the Tahingas, in agreement with the recommendation of the Commission of 1904. The judgment also disposed of further questions of minor importance. On April 17, 1907, the Court made a formal partition order, giving effect to it.

The principles on which the Native Appellate Court have based their conclusions are twofold. In the first place they consider that the land of the loyal natives was never confiscated under the New Zealand Settlement Acts or the Order in Council of 1865. With this opinion their Lordships have already intimated their agreement. The areas and boundaries, as the judgment points out, had not at that time been defined and were left for future inquiry. The Court thought that, this being so, it was impossible to adopt any other course than that of taking the native title into consideration, even if simply on the ground that experience

had shewn this to be the only equitable mode of dealing with such cases. They went on, however, to say, as a second ground of judgment, that "apart from the legal aspect of this case, and even if it were held to be Crown land granted to the natives, we cannot under the circumstances think of any other equitable way of dealing with the matter than by adhering as far as possible to native custom. We cannot imagine for a moment that it was intended that natives who remained loyal to the Crown and resisted the temptation to go into rebellion with their friends and relatives should be placed in any different or in a worse position than they would have been in had there been no rebellion at all. And it is sought to place one section of the loyal natives in a worse position."

Their Lordships are of opinion that the wide words of the section giving the Court power to take into account what are termed "the equities of the case" would have justified the Court in considering the original native title, even if it had been held to be extinguished, as well as the other matters referred to. A conclusion come to on this question would not, in their Lordships' opinion, be one on which it is desirable that the Judicial Committee should express an opinion. The prerogative of the Crown would no doubt in theory enable a review to be made of a judgment of an ordinary Court based on such a conclusion if it were obviously contrary to the ordinary principles on which justice ought to be administered throughout the British Empire. But in a case in which it appears from the language of the statute that the Parliament of New Zealand desired to entrust the tribunal named in the statute with a wide discretion, and in which it is far from obvious that the judgment of the local tribunal so chosen, with its special facilities for getting at the truth and with its special experience, was otherwise than right, their Lordships are unwilling to review the conclusion come to on what is almost, if not entirely, a question of fact. Moreover, by the concluding paragraph of the special case the parties have agreed that the questions referred to the Sovereign in Council should be exclusively questions of law. The only real question of law in the case is that as to the extinction of the native title, as to which their Lordships have already intimated an opinion

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adverse to the appellants. Taking this view, they think that there were materials on which the Court below might properly find, as they did, the fact of the ancient boundary between the two tribes. Having regard to the history of the case and to the terms of s. 26 of the Act of 1906, they do not consider that any admissions made by the male grantees at the Compensation Court of 1866, or the receipt of rent in subsequent years, should, as the appellants argued in their printed case and at the Bar, have furnished the tests to be applied by the Court below. Nor do they think that the "equities" directed by s. 26 to be taken into account were confined to these or any other particular facts or to apparent acquiescence by the grantees or their representatives in a supposed basis of equal rights. Indeed the history of the case displaces the inference of such acquiescence.

They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Soames, Edwards & Jones.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

Distinguished. MOHANLAL HARGOVIND
OF JUBBULPORE v. COMR. OF INCOME
TAX. [1949] 2 All E.R. 652.

Distinguished. MOHAN
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[PRIVY COUNCIL.]

KAURI TIMBER COMPANY, LIMITED . . APPELLANTS; J. C.*

AND

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THE COMMISSIONER OF TAXES RESPONDENT. *June 11, 12,**13;*ON APPEAL FROM THE COURT OF APPEAL OF NEW
ZEALAND.*July 10.*

Law of New Zealand—Income Tax Assessment—Profits derived from cutting and selling Timber—Value of Timber cut—Right to make Deduction—Land and Income Assessment Act, 1908 (No. 95 of the Consolidated Statutes of New Zealand), ss. 71, 79, and 87.

A company carried on in New Zealand the business of cutting, milling, and selling timber, and for the purpose of that business it had acquired, upon its incorporation and from time to time subsequently, rights over freehold and leasehold bush lands bearing natural timber, in some cases by purchasing the lands and in other cases by purchasing the timber thereon with the right to remove the timber within a stated period:—

Held that, under the Land and Income Assessment Act, 1908, which regulates the assessment of income tax in New Zealand, the company was not entitled in its assessment for income tax to make any deduction from the gross proceeds of its business in respect of the value of the standing timber which it had cut.

APPEAL from a declaratory order made by the Court of Appeal on an originating summons under the Declaratory Judgments Act, 1908 (of New Zealand).

The question in issue in the appeal was whether or not in assessing the appellant company (hereinafter referred to as the company) for income tax the company ought to be allowed to deduct from the gross proceeds of its business during any year the value of the standing timber cut and used for the purpose of its business during that year. The material facts, as appearing from an agreed statement of facts, were shortly as follows. The company was incorporated in the State of Victoria in the year 1888 and has since carried on in New Zealand the business of cutting, milling, selling, and exporting timber. Immediately after its incorporation the company, for the purpose of enabling

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD DE VILLIERS, LORD MOULTON, and SIR SAMUEL GRIFFITH.

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it to carry on the above business, acquired bush properties in New Zealand, either by purchase outright of the land with the standing timber upon it or by purchasing the timber with the right to cut and remove it at any time during a stated period, which in most instances was ninety-nine years. From time to time since 1888 the company similarly acquired other timber properties for the purpose of its business. During the four years ending in August, 1909, the total value of the growing timber so acquired amounted to 43,204*l*. In almost all cases the company paid a lump sum for the timber and rights acquired, but in a few cases it agreed to pay a royalty of so much per 100 feet as the timber was cut. No question arose in the appeal as to timber coming within the latter category, it being admitted that the deduction claimed in respect of it was properly made. During the years ending August 31, 1906, 1907, 1908, and 1909 respectively the value of the growing timber cut by the company from its lands was 29,768*l*., 36,224*l*., 28,874*l*., and 37,463*l*. By far the larger portion of the timber so cut was from the lands acquired by the company in the year 1888, when it first commenced business. None of the timber cut in the years ending August 31, 1906 and 1907, and hardly any cut in the years ending August 31, 1908 and 1909, was purchased during those years respectively. During no part of the said financial periods did the company divide among its shareholders any part of the amounts shewn by its accounts to be the value of the timber immediately before or at the time of being severed, but such amounts were treated as part of the capital of the company and were used, where and when possible, in the purchase of other timber or timber lands or on some other object of the company.

In assessing the company for income tax in respect of the income of the company for the years ending August 31, 1906, 1907, 1908, and 1909, the Commissioner of Taxes refused to allow the company to deduct from the gross proceeds of its business the value of the standing timber so cut and used during such financial years respectively, on the ground that in his opinion the deduction claimed was prohibited by s. 87 of the Land and Income Assessment Act, 1908, of New Zealand.

On March 15, 1912, the appellants applied by originating

summons to the Supreme Court of New Zealand for the determination of the question in the form stated in the judgment. The question of law raised by the summons was removed into the Court of Appeal for hearing and determination, and on May 3, 1912, that Court adjudged that the company was not entitled to the deduction claimed.

The law as to income tax in New Zealand is now contained in the Land and Income Assessment Act, 1908 (1) (Consolidated Statutes of New Zealand, vol. iii., p. 337), this Act being a consolidation and re-enactment, without amendment, of the then subsisting enactments of the Land and Income Assessment Act, 1900, and the Amendment Acts of 1903 and 1907. These Acts provide for two distinct taxes, namely, land tax and income tax. Down to the year 1907 land tax was assessed on the value of the lands, including the timber and flax thereon, but by s. 7 of the Act of 1903 (replacing s. 59, sub-s. 7, of the

(1) The Land and Income Assessment Act, 1908 provides:—

Sect. 71: "Where the taxpayer is a company, its income derived from business shall . . . be deemed to include all profits derived from or received in New Zealand from such business in each year ending at the close of March 31st, including therein all profits falling within the definitions of 'income derived from business' and 'income derived from employment or emolument' in sections 79 and 80 hereof and also all profits from investments of any kind, other than investments in land, and including also all dividends earned and sums carried to any reserve sinking or insurance fund however designated, and income tax shall be assessed and levied on all such income accordingly."

Sect. 79: "'Income derived from business' includes, but without limiting the meaning of the words, the profits derived from or received in New Zealand, in each year ending 31st March, from the following

sources:—(a) From any business . . . (f) From the extraction, removal, sale or treatment of minerals, timber or flax, whether by the owner of the land or by any other person and whether the said income is derived by way of rent, royalties, commercial profit, or otherwise howsoever."

Sect. 87: "In ascertaining the income derived from business, employment, or emolument no deduction shall be made in respect of any of the following items:— . . . (c) Investment of capital; expenditure of capital; loss of capital; capital withdrawn; . . . (f) Disbursements or expenses of any kind, not wholly and exclusively incurred in the production of the assessable income from such business, employment or emolument . . . (l) Losses, outgoing and expenses incurred in connection with the ownership of land, except in cases where the profits derived from such ownership and use are liable to assessment for income tax."

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Act of 1900) for the purpose of income tax an equivalent deduction was allowed in respect of timber or flax cut. By the Act of 1907 the land tax was considerably increased, but it was enacted by s. 22 of that Act that the value of minerals, timber, and flax were not to be taken into account for land tax assessment, and by the same section s. 7 of the Act of 1903 was repealed.

Sir R. Finlay, K.C., and Jellicoe, for the appellants. In arriving at the annual income or taxable profit of the appellants' business the prime cost or market value as standing timber of the timber cut is a proper deduction. The principles of law regulating the working and development of a wasting property like a mine or mineral deposits have no application to the facts of this case, and the decision in *Alianza Co. v. Bell* (1) is consequently distinguishable. The nature of the appellants' business was that described by Channell J. in his judgment in the King's Bench Division (2) in that case; it was a "general business of purchasing and developing similar properties" as distinguished from the working of a single wasting property. The purchases were in effect purchases of stock in advance. *Marshall v. Green* (3) and *Smith v. Surman* (4) shew that, save where the lands were purchased, the property in the timber passed only when severed, and that until then the appellants had no interest in the land, but only a profit à prendre. It is true that in *Commissioner of Taxes v. Kauri Timber Co.* (5) it was held that the rights acquired by the company were leasehold interests in land, but that was only for the purposes of the Land and Income Assessment Acts, 1891 and 1892. Even if the appellants acquired an interest in the land the same principle applies, and the nature of the business distinguishes the case from one in which a particular property of a wasting character is being worked. The deduction claimed is not "an expenditure of capital," or otherwise within the deductions prohibited by s. 87 (c), nor is it within s. 87 (f), for it is an expense exclusively incurred in the production of the assessable income.

(1) [1905] 1 K. B. 184; [1906] A. C. 18.

(2) [1904] 2 K. B. at p. 673.

(3) (1875) 1 C. P. D. 35.

(4) (1829) 9 B. & C. 361.

(5) (1899) N. Z. L. R. 17 S. C. 696.

The deduction also falls within the cases expressly excepted from the prohibition in s. 87 (*l*).

Salmond, K.C. (S.-G. for New Zealand), Danckwerts, K.C., and Northcote, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The present appeal is from an order made by the Court of Appeal of New Zealand under the Declaratory Judgments Act, 1908, of that Colony. An originating summons under that statute laid before the Court the following question:—"In what cases (if at all) and to what extent (if at all) is a company which in manner set forth in the statement of facts hereto annexed carries on (inter alia) the business of cutting, milling, and selling the standard timber owned by the plaintiff company entitled in its assessment for income tax to deduct from the gross proceeds of its business the value of the standing timber so cut by it?" It was admitted that the true question was whether, in striking the annual profits of its business for the purpose of taxation, the company was to deduct a proportion of the original capital on cost of acquiring the timber rights with the necessary possession of land to enable these to be exercised.

The company was incorporated in Victoria in the year 1888, and it has since that year carried on its business in New Zealand. Among the objects set out in its memorandum were "to purchase and acquire lands of any tenure, any kauri and other timber, in the Colony of New Zealand." Another object was "to purchase and acquire on any terms the company may think fit the rights of any persons under any contracts made or to be made by them for any such purchase as aforesaid." The third object under the memorandum was "to carry on the business of sawmill proprietors and timber merchants." The other objects were very wide, including a power to do everything "conducive to the attainment of any of the above objects or any objects similar thereto." It is apparent from this description that, so far as the company was concerned, it is a mistake to treat it as if its objects were merely the carrying on of a timber merchant's business.

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Immediately upon incorporation, namely, in 1888, the company acquired a large number of bush properties comprising freehold and leasehold lands, upon which great quantities of natural timber were growing. In the statement of facts appended to the originating summons the appellants put this acquisition as "either by purchase outright of the land itself, with the standing bush upon it, or by purchasing the timber with the right to cut and remove the same at any time within a stated period."

The Board was informed in the course of the discussion that at least a considerable portion of the property was acquired under leases for a period of ninety-nine years. This is the first salient fact in the case. The second is that there is no obligation upon the company immediately to cut down and remove the timber, or indeed to do so at any specific date, their rights with regard to the timber being co-extensive in time with the currency of their leases. The case is thus removed, in fact, from any analogy with decisions quoted at their Lordships' Bar, in which a sale of standing timber was coupled with the duty of its instant removal from the ground. And before approaching the construction of the New Zealand Acts it is expedient, in view of the argument presented, to state the manner in which such rights are viewed under the common law.

It appears to the Board that the present case involves no refinement of distinction; for the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in, and possession of, land. So long as the timber, at the option of the company, remained upon the soil, it derived its sustenance and nutriment from it. The additional growths became ipso jure the property of the company. All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases. All this, together with the business facilities for removal and sale, was granted to the company, which became thereby invested with the possession of, and an interest in, the land. This was so, undoubtedly, in a practical

and, indeed, very ample sense, and, in the opinion of the Board, it was so also in the eye of the law.

So far for the view of the common law. From the point of view of accounting and finance, the matter appears equally clear. There can be no question that the cost of acquisition of this possession of, and interest in, land, and of the timber rights thereon, was just as plainly a capital oncost as if the land, with the timber upon it, had been bought outright. And just as plainly it was not a proper accounting debit item as against revenue.

These general considerations would seem to settle the case. But there have been many litigated cases on these topics and frequent stages of legislative effort in the incidence and adjustment of taxation upon property so situated. With regard to the decided cases, the general principle as to the impropriety of treating a quota of invested capital, or of the corpus of the subject acquired, as a proper item of debit from annual profits received, can no longer be considered to be in doubt. As to coal, the decision of the House of Lords in *Coltress Iron Co. v. Black* (1) set out the principles with clearness and in detail. The case had reference to the taxation of a mine, and it was settled that the tenant was not entitled in computing the profits for income tax to deduct any sum as representing the amount of capital expended in making bores and sinking pits, even although that expenditure was necessitated by the exhaustion of the capital in the year's working. The case was accordingly much stronger than a mere attempt to debit a proportion, of original capital because the expenditure was of the nature of replacement or an equivalent for depreciation. Yet it was held that that equivalent was a capital equivalent and could not enter as a debit against annual profits. The leading judgment of Lord Penzance has been frequently referred to. And these expressions put the matter in brief compass :

“The words ‘profits received therefrom’ are here introduced to define the annual value of the thing which is to be taxed, which is the ‘mine,’ and it could not, I think, be intended that, for the purpose of calculating the ‘annual value’ of a ‘mine,’

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the original cost of the 'mine' itself, or any part of it, should be first deducted. On the contrary, the words 'profits received therefrom' in this connection mean, I think, the entire profit derived from the 'mine,' deducting the cost of working it, but not deducting the cost of making it."

The language of the learned Lord had, of course, specific reference to the expressions used in the English income taxing statutes, but the principle to be applied is clearly a general one to the effect that the consumption of capital cannot be treated in the ascertainment of profits as a revenue debit.

The same principles were enunciated in the various stages of *Alianza Co. v. Bell*. (1) 'The claim in that case was by a company which carried on a manufacture of nitrates and iodine by working up certain deposits—in particular, a deposit called "caliche," found upon land owned by them in Chile. It was clearly true that part of the corpus of what was purchased, namely, the deposits themselves, was being worked out and exhausted. But all the Courts held what is plainly expressed in one sentence of the judgment of Lord Macnaghten, that "this claim is prohibited by the third rule, being a claim in respect of money employed as capital."

The law—so clearly settled with regard to the working of coal and of nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber-bearing lands. The principle set out above in the present judgment as to the true reason for holding that such timber rights are of the nature of possession of, and interest in, the land itself has long been settled. A note by the learned editor in the first volume of Saunders' Reports, p. 277c, puts the matter thus: "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be

considered as a mere warehouse of the thing sold and the contract is for goods."

There may have been certain necessary modifications of the generality of this principle with respect to emblements or the products of industry like ordinary agricultural crops; but it is unnecessary to analyse these instances or to make any pronouncement upon some of the dicta of judges in later times. For the present is a broad case of the natural products of the soil in timber—a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realization. The judgment of Brett J. in *Marshall v. Green* (1) distinguishes this broad case and properly accepts the note in Saunders' Reports which has just been cited.

It is plain that the Legislature of New Zealand was apprised of the complexities attaching to the imposition and incidence of a taxation in circumstances like the present, and their Lordships see no reason to differ from the analysis of the various Acts of Parliament made in the very careful judgment of Edwards J. in the Court of Appeal. It is clear that in the legislative evolution which was occurring there was, as pointed out in the Court below, a determination "to avoid the injustice of double taxation upon the same matter." Another part of that evolution was this: that while, as is seen from the latest statute, that of 1908, the nature of the taxation was to be broadly divided into two parts, namely, a taxation upon land and a taxation upon income, an effort clearly appears, both in the definitions used and in the deductions which are set forth and are now to be mentioned, to make clear to collector and taxpayer alike the position of timber rights and the inadmissibility of deduction from profits of capital expenditure. In the years 1905 to 1907 the appellants in their statement of facts annexed to the originating summons explained that they had "paid land tax on such timber as and being part of the land on which it was growing." This was done in accordance with the then existing legislation. Then in 1907 and in 1908 (by the statutes of both years) certain changes took

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place. The provisions of the Act of the later year, which substantially repeat those of the former, are as follows (s. 45, sub-s. 1): "No land tax, whether ordinary or graduated, shall be assessed or payable in respect of the value of any minerals, timber or flax; and for the purpose of any such tax the value of minerals, timber or flax shall not be taken into account in estimating the value of the land." Timber was thus clearly removed from land taxation. In the opinion of their Lordships the profits derived from the sale or realization of timber were clearly brought within the scope of taxation upon income. For by s. 79, "'Income derived from business' includes . . . the profits derived from" a series of sources which are specified, and in the course of that series there is this: "(f) From the extraction, removal, sale or treatment of minerals, timber or flax, whether by the owner of the land or by any other person, and whether the said income is derived by way of rent, royalties, commercial profit or otherwise howsoever."

It appears to their Lordships that when the New Zealand statute has expressly prohibited timber from being taken into account in estimating the value of land, and therefore from being taxed as part of land, and has, on the other hand, expressly included profit arising from the extraction, removal, and sale of timber, howsoever the income has been derived, no further language on the part of the Legislature was required to make it clear that, even though it be granted that all the arguments to the effect that the removal of timber was the destruction or exhaustion of capital were correct, the Legislature has plainly put the income derived from the removal of timber into the profit account for the particular year.

It may in addition be pointed out that, by s. 87, in the ascertainment of income it is expressly provided that no deduction shall be made in respect of "loss of capital" or of "capital withdrawn."

Nor is it necessary to add that this mode of treating timber or mineral for taxation purposes contains nothing novel. For it has long been the law of the United Kingdom that the exhaustion of capital, however it might be treated on strict actuarial principles or according to certain principles of economics, may for the purposes of taxation be treated as profit. That profit

may be temporary, and so when it ceases the capital may be gone, and with the going of the capital there will also go the subject and the possibility of the tax. An interesting analysis of this problem is made by Lord Blackburn in *Coltness Iron Co. v. Black*. (1)

Their Lordships do not find any ambiguity in the New Zealand Acts on the matter of this appeal, and they do not entertain doubt that the Court below has come to a correct conclusion.

Their Lordships will accordingly humbly advise His Majesty that the appeal be refused. The appellants will pay the costs.

Solicitors for appellants: *Herbert Smith, Goss, King & Gregory*.

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey*.

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[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF THE COMMON-
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AND

THE ADELAIDE STEAMSHIP COMPANY, }
LIMITED AND OTHERS } DEFENDANTS.

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23, 24, 25;
May 2, 5, 6, 7
8, 27, 28;
July 25.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australian Industries Preservation Act, 1906, ss. 4, 7, 10, 15A—Contract or Combination in Restraint of Trade—Monopoly—Intent to the Detriment of the Public—Construction—Evidence to establish Offence.

A contract in restraint of trade which is unenforceable at common law, or a combination in restraint of trade which, if embodied in a contract, would be unenforceable at common law, are neither of them necessarily "to the detriment of the public" within the meaning of the Australian Industries Preservation Act, 1906, ss. 4 and 7, and a party to a contract or combination of that character cannot, merely because

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

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he is a party thereto, be taken to have intended this detriment. In a prosecution under either of those sections the wrongful intent must be proved by proper evidence. For this purpose the prosecutor may tender proof that the evils against which the Act is directed were the natural and necessary consequence of the contract or combination, monopoly or attempt to monopolize, and that those evils have in fact ensued. He cannot plead the evidence upon which he hopes to establish wrongful intention and rely on s. 15A of the Act as rendering proof of what he pleads unnecessary.

The principles of the law as to monopolies and contracts in restraint of trade prior to the passing of the above Act considered.

APPEAL, by special leave, from a judgment dated September 30, 1912, of the High Court of Australia in its appellate jurisdiction reversing, as regards the respondents, a judgment of Isaacs J. dated December 22, 1911.

The action was brought by the appellants as plaintiffs under the provisions of the Australian Industries Preservation Act, 1906 (No. 9 of 1906 of the Commonwealth), as amended by the Australian Industries Preservation Acts, 1907 (being in fact No. 5 of 1908), and the Australian Industries Preservation Act, 1909 (No. 26 of 1909). The more material provisions of these Acts, constituting together the Australian Industries Preservation Act, 1906—1909, are set out below. (1)

(1) The Australian Industries Preservation Act, 1906, by Part II., which is intitled "Repression of Monopolies," provided, *inter alia* :—

Sect. 4: "(1.) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—

"(a) with intent to restrain trade or commerce to the detriment of the public; or

"(b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests

of producers, workers, and consumers,

is guilty of an offence. Penalty Five hundred pounds.

"(2.) Every contract made or entered into in contravention of this section shall be absolutely illegal and void."

Sect. 7: "(1.) Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States with intent to control to the detriment of the public the supply or price of any service merchandise or commodity is guilty of an offence.

"Penalty: Five hundred pounds.

"(2.) Every contract made or entered into in contravention of

The action was commenced by writ dated June 4, 1910, and was brought against forty defendants to recover pecuniary

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this section shall be absolutely illegal and void."

Sect. 9: "Whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly knowingly concerned in or privy to

"(A) the commission of any offence against this Part of this Act; or

"(B) the doing of any act outside Australia which would if done within Australia be an offence against this Part of this Act shall be deemed to have committed the offence. Penalty: Five hundred pounds."

Sect. 10: "(1.) The Attorney-General, or any person thereto authorised by him, may institute proceedings in the High Court to restrain by injunction after hearing and determining the merits and not by way of interlocutory order the carrying out of any contract made or entered into after the commencement of this Act or any combination which—

"(a) is in restraint of trade or commerce to the detriment of the public; or

"(b) is destructive or injurious, by means of unfair competition, to any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

"Provided that except in the case of foreign corporations, or trading or financial corporations formed within the Commonwealth, this section shall

only apply to contracts or combinations in relation to commerce with other countries or among the States."

The Australian Industries Preservation Act, 1908, by s. 4, amended the Act of 1906 by inserting a section described as s. 15A, which section was itself amended by s. 12 of the Act of 1909, and as so amended read:

"15A. In any prosecution for an offence against sections 4, 7, 7A, 7B, or 9 of this Act the averments of the prosecutor contained in the information declaration or claim shall be deemed to be proved in the absence of proof to the contrary, but so that—

"(A) The averment in the information of intent shall not be deemed sufficient to prove such intent and

"(B) In all proceedings for an indictable offence the guilt of the defendant must be established by evidence."

The Australian Industries Preservation Act, 1909, s. 9, repealing s. 13 (1.) of the Act of 1906, substituted as follows:—

Sect. 13: "(1.) Proceedings for the recovery of pecuniary penalties for offences against this Part of this Act (other than indictable offences or offences against s. 15B, s. 15C, or s. 15E) shall be instituted in the High Court by way of civil action and shall be tried before a justice of that Court without a jury."

The Australian Industries Preservation Act, 1910, was passed after the commencement of the litigation, but contained, in s. 7, provisions as to procedure and evidence which were held to be applicable.

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penalties for alleged breaches of s. 4, sub-s. 1 (a), s. 7, sub-s. 1, and s. 9 of the Act of 1906, and also for an injunction restraining the defendants from a repetition or continuance of the alleged offences. The original defendants comprised two classes of persons; the first class consisted of companies owning or working various coal mines in the Newcastle and Maitland districts of New South Wales together with the managers or other responsible officers of those companies; the second class (being the present respondents) consisted of four shipping companies and their respective managing directors. The statement of claim was delivered on August 25, 1910, and was subsequently twice amended. It set out very numerous alternative charges against the defendants under the above sections, the general import of which was summarized in the following passage (accepted by both appellant and respondents) from the judgment of Isaacs J., who tried the case:—

“ Now, broadly speaking, the allegations against the defendants amount to this; first, that very shortly after the Act came into operation a complete express contract was entered into between the collieries owners of the first part and the shipowners of the second part in relation to inter-State trade and commerce in Newcastle and Maitland coal, that this contract was renewed and continued to exist and operate with some intermediate modifications down to the commencement of this action and was then still in force, and that it was entered into and at all events was renewed, with intent to restrain that trade and commerce to the detriment of the public. In other words, the contract itself is relied on as constituting an offence against s. 4.

“ Next, it is said that there existed during the period mentioned a combination between the two sets of proprietors—coal and shipping—created by the conduct of the parties, that conduct consisting of concerted business action carried on upon certain recognized lines laid down probably by some contract in the nature of that already referred to, or if not then by some understanding or practice of a similar tendency and effect, and that during the greater part of that period two other shipping companies not defendants were added to the combination, the Melbourne Steamship Company and James Paterson & Co.

This combination, it is averred, was maintained with the like intent to restrain the inter-State trade and commerce in Newcastle and Maitland coal to the detriment of the public.

“The defendants concerned are said to come within the ambit of s. 4 as to combinations—in three different ways—inasmuch as each of them was and continued to be a member of, and was engaged in, the combination.

“Next, it is charged that the business conduct of the defendants and their established relations with each other amounted to monopolizing or attempting to monopolize and to a combination and conspiracy to monopolize the trade and commerce in Newcastle and Maitland coal with intent to control, to the detriment of the public, the supply and price of the coal.

“And lastly, as to those who might be considered as merely assisting others to effect the prohibited acts, it is charged that they come within the provisions of s. 9 as aiding, abetting, counselling or procuring and are therefore to be deemed to have committed the principal offences.

“The detriment to the public which is alleged to have arisen and to have been intended as a result of the matters complained of consists in the practical and persistent annihilation of competition on land and sea, excessive, arbitrary and capricious prices charged to consumers, restriction of their opportunities of choice, difficulties in obtaining particular classes or grades of coal desired, substitution really compulsory of other coal for coal preferred, delays in obtaining delivery.

“The defence is in effect a denial of all that is charged by the plaintiffs.”

The evidence in the action, the hearing of which occupied seventy-three days, was very voluminous and fell into two main heads. The first head comprised evidence to establish a contract and combination between the defendants. The second head comprised evidence to shew that this contract and combination resulted in detriment to the public. The first head established that a contract and combination existed between the defendants; this was found both by Isaacs J. and by the Full Court, though they differed in their views as to its legality, and the existence of a contract and combination was not disputed in the appeal. Its

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terms were contained in an unsigned agreement or draft agreement between the colliery proprietors and the respondent shipping company, who had theretofore purchased most of the coal for the purposes of inter-State trade. This agreement was referred to as the shipping agreement. The colliery proprietors thereby agreed to sell to the respondent shipping companies (who were described as purchasing agents) the whole of the coal which might be required by them to supply the trade of the States of Victoria, South Australia, Western Australia, and Queensland, the colliery proprietors agreeing not to sell coal for consumption in those States except to the respondents or their nominees, and the respondents agreeing to buy from the colliery proprietors all the coal which they might require for their inter-State trade, and not to carry or deal in any other coal. The respondents as purchasing agents also agreed thereby not to resell, except in the case of certain small contracts, any of the coal purchased from the colliery proprietors at higher prices than certain specified c.i.f. prices which varied with the f.o.b. selling prices declared under the vend agreement hereinafter referred to. The evidence also established that shortly before the shipping agreement was entered into the colliery proprietors had entered into an agreement among themselves the terms of which were contained in an unsigned document referred to as the vend agreement. This agreement was not attacked by the statement of claim as being itself a breach of the provisions of the statutes, but its existence and terms were very material to the case. It came into operation on January 1, 1907, for a year and was subsequently renewed from year to year; it made provision for regulating the production and wholesale price of coal produced by the colliery proprietors, that is of the great bulk of the coal produced in New South Wales. Its effect, shortly, was that there should periodically be allotted to each of the collieries the proportion of the inter-State trade to be fulfilled by it, the proprietors each agreeing not to open new mining shafts or pits unless they were unable to maintain the allotted output with those already existing, and that provision should be made to fix from time to time the price of coal the produce of the various mines according to a classified table. Each proprietor might nevertheless sell the

coal from his colliery without restriction as to quantity or manner, but any proprietor who sold in excess of his allotted proportion was to pay a contribution at a specified rate to a common fund. The terms of the vend agreement and of the shipping agreement and the circumstances under which they were entered into are more fully stated in the judgment of their Lordships.

The second head of the evidence was mainly directed to establishing that a large and continuous increase was caused in the price of coal in the four States other than New South Wales to which the combination extended. The effect of this evidence is considered and dealt with in their Lordships' judgment. The defendants called no evidence at the trial, but submitted both upon the law and the facts that no case had been made against them. The learned judge (Isaacs J.) by his reserved judgment, delivered on December 20, 21, and 22, 1911, found that the colliery proprietors entered into the vend agreement in September, 1906, and that one of its objects was to enter into the class of contractual and business arrangements with the respondents which in fact ensued under the shipping agreement, which he found was made in September, 1906, and lasted with certain modifications until the end of 1907 and was renewed for 1908, 1909, and 1910. He also found that the colliery proprietors in pursuance thereof raised the price of coal (which during 1904, 1905, and the early part of 1906 had not been more than 7s. 6d. to 9s. per ton) to 10s. and 11s. per ton, and that a price of 9s. 1d. would have been profitable during 1907 and 9s. 8d. in the following years; that the respondents in accordance with the shipping agreement paid these increased prices but increased their prices to the consumers; that the public had borne, and were bearing a heavy detriment in regard to the price of coal attributable to the defendants' combination; and that the contract and combination occasioned serious detriment to the public in the shape of arbitrary and capricious discrimination of prices. Further he held that the defendants intended to prevent all effective competition both of production and of carriage and that this elimination of competition was the main and central object of the whole combination complained of. The learned judge, having regard to these findings of fact and to the general

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principle that persons must be deemed to intend the natural consequences of their acts, convicted the defendants of offences under s. 4, sub-s. 1 (a), s. 7, and s. 9 of the Act of 1906, and inflicted a penalty of 500*l.* upon each of the respondents and upon the other defendants with one exception; he also granted an injunction.

From this decision the respondents (but not the other defendants) appealed, their appeal being heard by the Full Court on August 26, 1912, and the following days. The Full Court, consisting of Griffith C.J., Barton J., and O'Connor J., by a reserved judgment delivered by the Chief Justice on September 20, 1912, unanimously reversed the decision of Isaacs J. and directed judgment to be entered for the respondents. The judgment of the Full Court commenced by considering the meaning of ss. 4 and 7 of the Act of 1906; the learned judges considered first the meaning of "detriment," and from the provision of s. 4, sub-s. 1 (b), drew the inference that the Legislature did not think that an act which was apparently detrimental to one class of interest, say to consumers, was necessarily detrimental to the public as a whole. They continued: "In our judgment, it is an essential element of an offence under s. 4 (1.) (a) that there should be an intent to restrain trade or commerce to the detriment of the public, and mere intent to restrain trade or commerce, without the further intent to cause detriment to the public, is not sufficient." They rejected (as Isaacs J. also did) the argument that all agreements in restraint of trade were, in the eyes of the law, detrimental to the public, and said: "in our judgment the intent, which is made by s. 4 an essential element of the offence, must be a real actual intention and not a constructive intent to be imputed by virtue of an ancient doctrine of law which is recognized by Parliament as not applicable to the existing conditions of the Commonwealth. We agree, of course, that there may be cases in which *res ipsa loquitur* so that the intention to cause detriment to the public may be inferred from the nature of the contract or combination itself. But this is a matter relating to the proof of the offence and not the nature of it." So also they held that proof of an actual intent to the detriment of the public was essential under s. 7, and

continuing they said: "It follows that the real subject of inquiry in this case is whether the appellants entered into the contract or combination alleged with an actual intent to restrain trade to the detriment of the public. That is entirely a question of fact and the relevant facts are not very complicated, although a vast amount of evidence has been put before the Court. There is no real dispute as to the actual facts. The conflict is as to the proper inference to be drawn from them." After considering the evidence of the circumstances under which the vend agreement was made, they said: "we find as a fact at this time all parties honestly believed, and believed on grounds which were not only reasonable but very substantial, that the prosperity of the Newcastle and Maitland districts was in danger, as well as their own individual interests, by reason of the excessive competition and the unremunerative prices obtained for coal. . . . In our opinion the fair inference to be drawn from the tenor of the vend agreement itself is that the intention of the parties was to put the Newcastle coal trade on a satisfactory basis, which would enable them to pay adequate wages to their men, and to sell their coal at a price remunerative to themselves, having regard to the capital and risk involved in the enterprise." After an examination of the terms of the shipping agreement, the judgment stated: "we come to the conclusion that the shipping agreement does not on its face disclose an intention either to restrict trade to the detriment of the public, or to monopolize the inter-State trade in Newcastle coal to the like detriment. . . . We proceed then to consider whether an intention to cause detriment to the public can be inferred from the acts of the defendants consequent upon the agreement." The learned judges, after considering the evidence, rejected the finding of Isaacs J. that there had been an unreasonable increase of price, and found as a fact that the f.o.b. prices of 10s. a ton fixed for 1907 and 11s. for 1908 and afterwards not only were not shewn to be unreasonable but were affirmatively shewn to be reasonable, and they also found that the prices at which the shipowners sold were not unreasonable. The learned judges, in conclusion, held that the Crown had failed to prove any intent upon the part of the defendants to the detriment of the public or any actual detriment to the public,

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J. C. They therefore allowed the appeal and dismissed the claim
 1913 against the present respondents, both as to penalties and as to
 the injunction claimed under s. 10.

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Sir R. Finlay, K.C., Wise, K.C., and Arthur Page, for the
 appellant. A contract in restraint of trade which is un-
 enforceable at common law, or a combination in restraint
 of trade which, if embodied in a contract, would be unenforce-
 able at common law, are necessarily "to the detriment of the
 public" within the meaning of the statute. The parties to
 such a contract or combination must be taken to have
 intended this detriment if it is the natural consequence of
 the contract or combination. A review of the authorities on
 restraint of trade shews that in determining whether a
 contract in restraint of trade is enforceable or not the Courts
 examine whether the particular restraint is reasonable and that
 if it is to the detriment of the public hold it to be unreasonable
 and consequently unenforceable: *The Case of Monopolies (Darcy*
v. Allein) (1); *Mitchell v. Reynolds* (2); *Rex v. Waddington* (3);
Hawkins' Pleas of the Crown, vol. ii., bk. 1, ch. 79, tit.
 "Monopolies"; ch. 80, tit. "Forestalling"; *Wickens v.*
Evans (4); *Mallan v. May* (5); *Hilton v. Eckersley* (6); *Hare v.*
London and North Western Ry. Co. (7); *Collins v. Locke* (8);
Nordenfelt v. Maxim Nordenfelt Co. (9) The proposition con-
 tended for is more especially supported by the judgment of
 Parke B. in *Mallan v. May* (10), the judgment of Bowen L.J. in
 the Court of Appeal in the *Maxim Nordenfelt Case* (11), and that
 of Lord Watson (12) in the same case in the House of Lords.
 The test has always been the same, although improved means
 of communication have widely enlarged the view as to what
 local limit of restraint is reasonable.

The question considered in *Mogul Steamship Co. v.*

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| (1) (1602) 11 Rep. 84b. | (6) (1856) 6 E. & B. 47. |
| (2) (1711) 1 P. Wms. 181; 1 Sm. | (7) (1861) 2 J. & H. 80. |
| L. C. (11th ed.) 406. | (8) (1879) 4 App. Cas. 674. |
| (3) (1800) 1 East, 143. | (9) [1894] A. C. 535. |
| (4) (1829) 3 Y. & J. 318. | (10) 11 M. & W. at p. 665. |
| (5) (1843) 11 M. & W. 653. | (11) [1893] 1 Ch. at pp. 667, 668. |
| (12) [1894] A. C. at p. 565. | |

McGregor (1) was whether an action for damages would lie in respect of the combination there under discussion and the decision is not applicable to the present case. Lord Hannen and Lord Bramwell in that case distinguish the question whether the contract was enforceable in law from the question to be decided; and the latter Lord's speech is based on the assumption that the contract was unenforceable. The clauses in the shipping agreement which precluded the colliery proprietors from supplying coal for consumption in the States except to the respondents or their nominees, and precluded (with unimportant exceptions) the respondents from dealing in or carrying any coal except that supplied by the colliery proprietors, render the agreement one which is unenforceable at common law: *Collins v. Locke*. (2) In *North Western Salt Co. v. Electrolytic Alkali Co.* (3), now on appeal to the House of Lords, a contract very similar to the shipping agreement was held by the Court of Appeal to be unenforceable although the point had not been pleaded. [*Allen v. Flood* (4), *Quin v. Leatham* (5), *United Shoe Machinery Co. v. Brunet* (6), and *Russell v. Amalgamated Society of Carpenters* (7) were also referred to.]

The Sherman Act of the United States is substantially equivalent in effect to the Australian legislation, since the wrongful intent which is expressly made an essential element of an offence under the latter is made so under the Sherman Act by judicial interpretation. The American decisions under that Act treat enforceability as the test of whether an offence has been committed: *Standard Oil Co. of New Jersey v. United States* (8); *United States v. American Tobacco Co.* (9)

If the terms of the shipping agreement do not themselves give rise to a presumption *juris et de jure* that the contract was to the detriment of the public, there is a presumption *de jure* which is not rebutted by the evidence. Further, apart from any presumption, the evidence affirmatively established the wrongful intent.

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(1) [1892] A. C. 25.

(5) [1901] A. C. 495.

(2) 4 App. Cas. 674.

(6) [1909] A. C. 330.

(3) (1912) 107 L. T. 439.

(7) [1912] A. C. 421.

(4) [1898] A. C. 1.

(8) (1910) 221 U. S. 1.

(9) (1910) 221 U. S. 106.

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The appellant relies strongly on s. 7 in addition to s. 4, though any circumstances which come within s. 7 also come within s. 4. The effect of the evidence is that the object of the respondents was not only to establish a monopoly in Newcastle coal, but also in the inter-State trade in that coal. This was detrimental to the public: *Underwood v. Barker*. (1) The essence of a destructive monopoly at common law was a deliberate intention to prevent other persons from engaging in the trade. The evidence shews that there was this intention in the present case. [Reference was also made to 9 Anne, c. 30 (c. 28 Ruffhead), repealed by 30 & 31 Vict. c. 59; 12 Geo. 3, c. 71; 7 & 8 Vict. c. 24; and to the judgment of Fry L.J. in *Mogul Steamship Co. v. McGregor* (2) and to the judgment of Bowen L.J. in *Maxim Nordenfelt Co. v. Nordenfelt*. (3)]

The judgment of Isaacs J. was right and should be restored.

Mitchell, K.C., Atkin, K.C., Schiller, and Nesbitt, for the respondents. To constitute an offence under s. 4 of the Act of 1906 it is essential that the wrongful intent to the detriment of the public should be established by evidence. A mere intention to stifle or limit competition cannot be an offence under s. 4, sub-s. 1, because, even if the restraint on competition is so large as to create a monopoly, it is not an offence under s. 7 unless it is carried out with intent to control trade to the detriment of the public. The public referred to in ss. 4 and 7 include not only consumers but also producers, whether capitalists or employees, and distributors. A combination to raise prices in order to give a fair remuneration to the producers is lawful. It is expressly provided by s. 6, sub-s. 1 (b), of the Act that competition is to be deemed unfair *prima facie* if it would probably or does in fact result in an inadequate remuneration for labour. This shews that it was part of the policy of the Australian Legislature to protect local industries, and that in order to establish a detriment to the public it is not sufficient to prove that a rise of prices resulted from the conduct complained of. The evidence shews that the f.o.b. prices were fixed by (1.) the pressure of the employees for higher wages; (2.) the fact that those prices could

(1) [1899] 1 Ch. 300.

(2) 23 Q. B. D. at pp. 628, 629.

(3) [1893] 1 Ch. at p. 656.

be obtained. The findings of fact by the High Court were justified by the evidence and are conclusive in favour of the respondents.

[They were stopped by their Lordships.]

Wise, K.C., in reply.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. This is an appeal from an order of the High Court of Australia in its appellate jurisdiction reversing a judgment of Isaacs J., dated December 22, 1911, and made in an action instituted by the Attorney-General of the Commonwealth under the provisions of the Australian Industries Preservation Act, 1906, and two amending Acts, No. 5 of 1908 and No. 26 of 1909. The Act of 1906 was a new departure in legislation and its true construction may be a matter of far-reaching economic importance. Their Lordships propose to consider its provisions with some particularity. Before doing so, however, it will be convenient, having regard to the arguments both here and in the Courts below, to refer to the law as it existed prior to and at the passing of the Act in relation to monopolies and contracts in restraint of trade.

At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the *Mogul Steamship Case* (1)). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on

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(1) 23 Q. B. D. 598; [1892] A. C. 25.

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which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.

The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies. Further, monopolies were in the eyes of the lawyers of that time attended with the following evils: first, increase in the price of the wares, and secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition (11 Rep. at 86b).

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has,

however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt v. Maxim Nordenfelt Co.* (1) For a contract in restraint of trade to be enforceable in a Court of Law or Equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal C.J., in *Horner v. Graves* (2)) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. Lindley and Bowen L.JJ. had suggested in the Court below that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by Lindley L.J. in *Underwood v. Barber*. (3) The term monopoly cannot be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is

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(1) [1894] A. C. 535.

(2) (1831) 7 Bing. 735.

(3) [1899] 1 Ch. 300.

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likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly. It is so called by Farwell L.J. in the case of *North Western Salt Co. v. Electrolytic Alkali Co.* (1), now under appeal to the House of Lords.

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of engrossing, which, according to Hawkins' Pleas of the Crown, vol. ii., bk. 1, ch. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen LJJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Vict. c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and, if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion, clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the

party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible.

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (the *Mogul Steamship Case* (1)).

Such having been the state of the law when the Act of 1906 was passed, their Lordships will proceed to consider the various provisions of that Act and its proper interpretation.

The full title of the Act is "An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies," and Part II., comprising ss. 4 to 14, inclusive, is intituled "Repression of Monopolies." Sect. 4 provides that any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to, trade or commerce among the States of the Commonwealth (a) with intent to

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(1) 23 Q. B. D. 598; [1892] A. C. 25.

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restrain trade or commerce to the detriment of the public, or (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence the penalty for which is fixed at 500*l*. Sect. 6 defines unfair competition as "unfair under the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved. Sect. 7 provides that any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce among the States with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence the penalty for which is fixed at 500*l*. Sect. 9 provides that whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or privy to an offence under s. 4 or s. 7 shall be deemed to have committed the offence and be subject to a penalty of 500*l*. Sect. 10 of the Act enables the Attorney-General of the Commonwealth to institute proceedings for an injunction restraining the carrying out of any contract or combination which is, in fact, in restraint of trade or commerce to the detriment of the public, or is, in fact, destructive or injurious by means of unfair competition to any such Australian industry as mentioned in s. 7. The amending Act No. 5 of 1908 contains a section which, as amended by the amending Act No. 26 of 1909, provides that in any prosecution for an offence against ss. 4, 7, or 9 of the Act of 1906 the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent.

It is in their Lordships' opinion quite clear that the terms "monopolies" and "monopolise" as used in the Act of 1906 do not refer to a monopoly in the strict legal sense, but in the more popular sense in which Lindley and Bowen L.JJ. used the term "monopoly" in the dicta above mentioned. "Destructive monopoly" is equivalent to "pernicious monopoly" as used by

the learned Lords Justices, and, no doubt, undue enhancement of the prices of goods or services is contemplated as one of the evils which may render a monopoly in the popular sense destructive or pernicious, it being assumed that such enhancement is to the public injury or detriment. Similarly there can be little doubt that one of the ways in which a restraint of trade might in the view of the Commonwealth Legislature be detrimental to the public was by its creating a pernicious monopoly in this popular sense of the word. There may, of course, be other ways in which a monopoly or restraint of trade may enure to the public detriment, but undue enhancement of prices must certainly be one. It should be observed that for the statutory misdemeanours created by ss. 4 and 7 there must be an intention to bring about all or some of the evils against which the Act is directed, and if there be such an intention it is quite immaterial whether these evils have or have not actually ensued. But in proving the intention the actual results of the contract or combination, or the monopoly or attempt to monopolize, may be of great materiality, for in a Court of law every man is taken to intend the natural or necessary consequences of his action. This point is emphasized by contrasting ss. 4 and 7 with s. 10, under which the contract or combination must be proved to have led to the evils against which the Act is directed. Thus, in proceedings for offences under ss. 7 and 9 the prosecutor must first establish the contract or combination or the monopoly or attempt to monopolize. He must then establish the wrongful intention necessary to constitute the misdemeanour. In establishing the contract or combination or the monopoly or attempt to monopolize he may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim. But the wrongful intention must always be proved by proper evidence. For this purpose the prosecutor may, if he chooses, tender proof that the evils against which the Act is directed were the natural or necessary consequences of the contract or combination, monopoly or attempt to monopolize, and that these evils have in fact ensued. He cannot, however, in their Lordships' opinion, plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of the Act of 1908 as rendering proof of what he pleads unnecessary.

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With regard to s. 10 these last-mentioned provisions appear to have no application at all, and s. 10 itself has nothing to do with monopolies or attempts to monopolize, but is limited to contracts or combinations in restraint of trade or destructive of Australian industries.

It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which if embodied in a contract would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcement of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such contract had an intention to injure the public. It is quite common in a contract of service to find a clause restricting the area in which the employee may carry on a business similar to that of his employer after the termination of the service, and such area is often held too wide for the restraint to be enforceable. In such cases both parties have as a rule bargained with a single view to their own interests, though in the opinion of the Court they have been mistaken as to the area of the restraint required in their own interest, but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations, such as that which was the subject of the decision in *Hilton v. Eckersley*. (1) If this were the true effect of the Act, no trade union would be free from the risk of proceedings under s. 4. It was said that this result with regard to trade unions was foreseen and provided against, by making the fiat of the Attorney-General necessary for any such proceedings, but their Lordships cannot believe that the Legislature intended to make the existence of trade unions, the economic advantage of which has often been

(1) 6 E. & B. 47.

recognized in modern legislation, dependent on the economic views of the Government for the time being or its law officers.

It was also strongly urged that in the term "detriment to the public" the public means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended.

In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous statute known as the Sherman Act, and in particular on the case of *Standard Oil Co. of New Jersey v. United States*. (1) Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolize which involve detriment to the public and in which a sinister intention is of the essence of the offence.

(1) 221 U. S. 1.

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Their Lordships are now in a position to consider the actual facts of the present case, and the inferences to be drawn therefrom, it being borne in mind that the offences charged against the respondent companies are under s. 4 (1.) (a), and alternatively under s. 7 of the Act of 1906, while the other respondents are charged under s. 9 with aiding and abetting the respondent companies in those offences.

The chief coalfield in New South Wales is the Newcastle coalfield. This field has been worked for nearly a century, and was for many years the only coalfield worked in New South Wales. Later, the Southern collieries and the Lithgow or Western collieries were opened up, and their coal began to compete with the Newcastle coal. The latter coal has, however, the advantage of easier access to deep water, and is for some purposes better than coal from the Southern or Western collieries.

For the last forty years wages in the Newcastle coalfield have, by agreement between the colliery proprietors and the workmen, varied with the selling price of coal. There is an assumed minimum price paid per ton for the best coal f.o.b. at Newcastle corresponding with an assumed minimum hewing rate. The probable price f.o.b. at Newcastle is declared for each year in advance by agreement between the colliery proprietors and the workmen, and for every 1s. by which the declared price exceeds the minimum price the minimum hewing rate is increased by 4d. and the wages of certain other workmen by sums amounting to 2½d., so that out of every shilling advance in price 6½d. in all goes to the workmen. It is not the practice to vary the declared price by fractions of 1s. This method of determining wages appears to their Lordships to be eminently reasonable and well calculated to prevent labour troubles. The declaration of the probable price for any year for the purpose of determining wages does not, however, in itself preclude the colliery proprietors from selling their coal at such prices as they think fit. It does not itself prevent the actual price of coal being determined by free competition, and for this reason the colliery proprietors of the Newcastle coalfield have from time to time entered into a combination or agreement usually called "a vend" upon terms which on the one hand

preclude any of its members from selling the best coal at less than the declared price, and other grades of coal at proportionate prices, and on the other hand assure to each individual proprietor a certain proportion of the total output. Such a combination or agreement would, of course, be in restraint of trade, and the question whether or not it was enforceable at common law would depend on the considerations to which their Lordships have already referred.

In the first years of the present century a new coalfield situate about twenty miles from Newcastle, and sometimes called the Maitland coalfield, began to be developed, and Maitland coal gradually forced its way into the market in competition with Newcastle coal. The competition was so fierce that it became impossible to maintain any "vend" among the colliery proprietors in the Newcastle field. These proprietors accordingly entered on a course of ruinous competition with each other and with the colliery proprietors in the Maitland field, until in the spring of 1906, though the declared price of the best coal was for the purposes of the hewing rate 9s., such coal was being actually sold f.o.b. at Newcastle at 7s. 6d. only. The collieries in the Newcastle coalfield were ceasing to pay dividends and falling into the hands of the banks who had financed them; the miners had little chance of an advance in wages, though there had been a general advance in prices; and the prosperity of Newcastle, which is dependent on the coal industry and the shipping industry in connection therewith, was seriously threatened.

Further the coal output of the Newcastle field was in the spring of 1906 about equally divided between the home trade, the inter-State trade, and the foreign trade. For the purpose of the inter-State and foreign trade the colliery proprietors sold their coal f.o.b. at Newcastle. In the case of the inter-State trade such coal was for the most part bought by shipping companies who owned coal vessels in which they carried it to the various ports of disembarcation in the States and there sold it wholesale or retail. In some cases the coal sold was delivered to the purchasers straight from the vessel itself. In other cases it was landed and stored by the shipping companies and subsequently sold. The shipping companies, in fact, carried on the business

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of coal merchants as well as the business of shippers. Under these circumstances it was essential in the interest of the colliery owners that there should be a sufficient number of shipping companies always ready to purchase and ship their coal, and it was essential in the interest of the shipping companies that they should always be able to purchase and ship coal as soon as their vessels arrived at Newcastle; otherwise the colliery proprietors might be put to expense in storing coal pending the arrival of a vessel in which it could be shipped, and the shippers might incur expense in the nature of demurrage. J. & A. Brown & Co., who owned the chief colliery in the Maitland field, had vessels of their own and were themselves exporting coal to Melbourne and Adelaide, and selling it there through their own agents. The shipping companies were already suffering from the low prices at which J. & A. Brown & Co. sold their coal in those towns. Moreover, some of the shipping companies had controlling interests in companies owning collieries in the Newcastle and Maitland fields, and were suffering from the reduction due to the competition of J. & A. Brown & Co. in the f.o.b. prices at Newcastle as well as the c.i.f. prices at Melbourne and Adelaide.

It was under these circumstances that on January 5, 1906, there was a meeting of some of the proprietors of collieries in the Newcastle and Maitland fields. The chairman pointed out the necessity of forming an association of all the collieries if the present very unsatisfactory state of the coal trade was to be improved. The meeting thereupon passed a resolution that it was desirable to form an association to raise and maintain the price of coal, and a committee was appointed to draft a scheme. The idea obviously was to reconstitute the "vend," admitting the colliery owners in the Maitland field, whose competition has proved so disastrous. The necessity of obtaining the concurrence of those shipping companies who had interests in the Newcastle and Maitland fields was expressly recognized. Lengthy negotiations followed, of which a record was preserved and put in evidence at the trial. Ultimately a draft agreement, hereinafter called "the vend agreement," was prepared, and in April, 1906, assented to by a number of the colliery proprietors,

including Messrs. J. & A. Brown & Co., and, though never actually executed, was no doubt acted on and considered binding by the assenting parties.

The chief provisions of the vend agreement may be stated as follows: An association is formed of which the colliery companies and firms parties thereto are the original members. There is provision for the admission of new members and the withdrawal of members under defined circumstances. Each constituent company or firm appoints a representative, and these representatives constitute a board. The voting power of each representative on the board is determined by the proportion of the total trade which under a subsequent clause of the agreement is allotted to the company or firm by which he is appointed. The board may appoint and delegate any of its powers to an executive committee, and (under clause 9) must appoint a representative whose duty it is to allocate to the particular collieries the proportions of the inter-State trade to be fulfilled by them respectively. The resolutions of the board are to be binding on the members of the association. Each member contributes to the general funds of the association, as to the application of which the board has complete discretion. The total trade is allotted in certain proportions between the original members, provision being made for the increase or decrease of these proportions in the event of the admission of new members or the withdrawal of old members, or in other events specified. No member is to open up any new shaft, pit, or adit unless there be danger of his being unable to maintain his allotted proportion of the total trade by means of his existing shafts, pits, and adits. The board is to fix the selling price of all coal won from the collieries of the members of the association, and for this purpose these collieries are divided into four classes. The prices are to be the same for all collieries in the same class, and to all purchasers irrespective of quantity, but so that the board may, to meet the exigencies of trade, fix differential rates for particular markets, contracts, or classes of coal, and if it sanctions a contract for the supply of coal at less than the selling price for the time being may compensate the contractor out of the general funds of the association. All members of the association may dispose of

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the produce of their collieries without restriction as to quantity and manner except as therein provided, but in order to induce members whose trade may fall off not to endeavour to increase it by underselling contrary to the agreement, every member whose trade in any quarter exceeds his estimated proportion is to contribute in manner therein provided to a fund for compensating those members whose trade is less than their estimated proportions, accounts in this respect being adjusted at the end of each year, having regard to the total trade for such year and the actual proportions in such trade allotted to the various members. The agreement also contains clauses with regard to strikes, lock-outs, and references to the industrial court. The agreement is expressed to commence on January 1, 1907, and to continue in operation for a year, but there are provisions for its earlier determination and its extension for a further period. Their Lordships are of opinion upon the evidence that the vend agreement was acted upon from early in April, 1906, and must be taken to have been extended and renewed with minor variations from year to year, and to have been in force at the commencement of these proceedings. It is obviously an agreement in restraint of trade.

During the negotiations which led up to the vend agreement, the possibility and desirability of securing a steady market for coal for the inter-State trade were subjects of discussion. This was a matter of interest not only to the colliery proprietors, but to those shipping companies who were interested in Newcastle or Maitland coal. A suggestion was made that with this object it might be advisable for the vend when constituted to enter into some agreement with the shipping companies who had theretofore purchased most of the Newcastle coal for the purposes of the inter-State trade. After prolonged negotiations between the colliery proprietors on the one hand and the shipping companies on the other hand, a draft agreement, hereinafter called the shipping agreement, was prepared, and in September, 1906, assented to by the colliery proprietors constituting the vend, including J. & A. Brown & Co. on the one hand and the four respondent companies and J. & A. Brown & Co. on the other hand, J. & A. Brown & Co. assenting both as colliery proprietors and as

shippers. The shipping agreement was never actually executed, but it was no doubt acted upon and considered binding by the assenting parties. Its chief provisions may be stated as follows: The colliery proprietors, therein called the vendors, are to sell to the shipping companies, therein called the purchasing agents, all the coal which the latter may require for the inter-State trade, such coal being purchased from all or some of the collieries therein referred to as mentioned in a schedule which is not in evidence, but which no doubt comprised the vend collieries, classified in the same manner as in the vend agreement. The vendors and purchasing agents are each to appoint a representative; the representative of the purchasing agents is, a week before the commencement of each month, to give notice to the vendors' agent of the approximate quantity and the particular class of coal required during such month, and the vendors are to supply that quantity and class accordingly. The vendors are, if possible, to comply with any requisition of the purchasing agents if they require coal from any particular colliery, but only when such colliery has not already reached its limit of output. When, however, the purchasing agents have with the assent of the vendors contracted to supply coal from a particular colliery, such coal is, if practicable, to be supplied whether or not such limit has been reached. This provision undoubtedly refers to the vend agreement. The coal is to be delivered f.o.b. at Newcastle, the prices to be paid for the various classes being fixed by the colliery proprietors each year in November and to take effect for the ensuing year commencing January 1. The vendors are not to supply any coal for the inter-State trade except to the purchasing agents, and the purchasing agents are not (with certain exceptions) to deal in or carry any coal except what they purchase from the vendors. The purchasing agents are not to resell any coal purchased from the vendors at higher prices per ton than the c.i.f. prices therein specified. These maximum c.i.f. prices vary with the f.o.b. prices at Newcastle, but to an extent which cannot be accounted for by any increase in cost, insurance, or freight attributable to the increased f.o.b. prices. The intention obviously is to give the purchasing agents an opportunity of benefiting by any increase in the f.o.b.

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prices provided they can obtain orders at increased c.i.f. prices. The purchasing agents may exceed these c.i.f. prices by 3s. a ton on large coal supplied under contracts with a single consumer not exceeding 10,000 tons in any one year, and also where the resale is not c.i.f. at any port of delivery by the amount of costs actually incurred for lighterage, wharfage, carriage, or otherwise as therein mentioned. If the purchasing agents sell at prices exceeding the maximum prices specified they are to account to the vendors for the excess, it being the intention of the parties to place the purchasing agents in the position of agents only, but clothed with a liability for all coal ordered at the rates agreed on, and that the difference between such rates and the maximum prices on resale shall represent compensation for freight and remuneration for work of realization. Where, however, the vendors consent to a resale at a price higher than the maximum, the amount of the excess is to be equally divided between the vendors and purchasing agents. The shipping agreement is expressed to commence on January 1, 1907, and to continue for one year from that date. There are no provisions for its earlier determination or for its renewal, but their Lordships are of opinion, on the evidence, that it was acted upon not only in 1907 but in 1908, and also in 1909 and 1910, and must be taken to have been renewed accordingly. It also is without doubt a contract in restraint of trade.

It is the shipping agreement and not the vend agreement which is impeached in these proceedings, but the Crown does not admit that the vend agreement could not itself have been impeached under ss. 4 (a) and 7 of the Act. If the intention with which the vend agreement was entered into be unlawful, it would be evidence of a like unlawful intention in entering into the shipping agreement, for the latter agreement was undoubtedly entered into by the colliery proprietors in furtherance of the policy embodied in the vend agreement, and the shipping companies were well acquainted with the terms of the vend agreement. If on the other hand the vend agreement were entered into with no unlawful intent, it would make it much harder to infer an unlawful intent from the shipping agreement. Their Lordships therefore propose to consider whether an unlawful intention,

i.e., an intention to restrain trade to the detriment of the public, can be gathered from these agreements considered separately or as part of a general scheme, it being admitted that each agreement constitutes a contract or combination in restraint of trade. The unlawful intention alleged is, so far as the vend agreement is concerned, in substance an intention to injure the public (1.) by raising the price of coal, and (2.) by annihilating competition in the Newcastle coal trade. There was some suggestion of an intention to injure the public in other ways, namely, by causing delays or difficulties in prompt compliance with contracts for the supply of coal or a particular class of coal. This suggestion can, in their Lordships' opinion, be properly ignored. It attributes to the parties an intention to bring about delays and difficulties from which they could derive no possible benefit, and that, too, though the vend agreement, from which the Court is asked to infer the intention, contains provisions designed, so far as consistent with its main object, to preclude such delays or difficulties from arising at all.

There can be no doubt that the vend agreement was intended to preclude competition in the sense of underselling among its members, and by this means to raise and maintain the price of coal won from the Newcastle and Maitland coalfields. *Ceteris paribus* low prices are of advantage to the consuming public, and their Lordships will assume that in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would from the standpoint of public interest require some justification.

In the present case, however, it was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. Even Isaacs J., who decided in favour of the Crown, was apparently of opinion that there was early in 1906, at any rate, some case for raising the price of coal considerably above its then selling price of 7s. 6d. per ton. It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors

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should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent. Not only can no trace be found in the vend agreement of an intention to raise the price of coal to an unreasonable extent, but such an intention is highly improbable, for it was not in the interest of the vend to charge unreasonable prices. The vend did not comprise all the collieries in the Newcastle and Maitland fields, nor any of the Southern or Western collieries. It did not, therefore, eliminate competition either in home trade, the inter-State trade, or the foreign trade. It is to be observed that the selling price to be fixed under the vend agreement applies to all these trades. If the vend fixed the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the 'vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors. It would certainly check the demand for the coal of its members. That this is so is apparent from the action of the vend in 1909, when, in spite of pressure from the miners, they refused to advance the price of coal for the ensuing year more than 1s., because in their opinion it would be impossible to obtain any greater price in the foreign market. It was argued that the vend controlled so large a proportion of the home and inter-State trade that they could afford to ignore the competition of others in the home and inter-State markets, but in the foreign market there was no limit

to the competition to which they were subject. Had there been any intention of charging excessive prices in the home or inter-State trade, as opposed to the foreign trade, one would have expected the vend agreement to provide for reduced prices for coal supplied for foreign consumption. It was argued that this might have been done under the terms of the vend agreement. But no inference adverse to the vend can in their Lordships' opinion be drawn from this possibility, and it was never, in fact, done. Indeed, their Lordships cannot find any satisfactory evidence that, except in some few isolated cases, and for some special reason, coal was ever supplied for the foreign trade at less prices than for the inter-State or home trade. The vend agreement may or may not contain provisions unenforceable at common law, but it certainly does not, on the face of it, disclose any such intention to injure the public as would make it illegal under s. 4 (1.) (a) of the Act, either because it was intended to limit competition among its members, or because it was intended to raise and maintain prices. Again, even assuming that the vend agreement amounts to an attempt to create a monopoly within the meaning of s. 7 of the Act, it certainly does not, on the face of it, disclose any intention of controlling the supply or price of coal to the detriment of the public by unduly raising prices or otherwise.

Passing to the shipping agreement, their Lordships are of opinion that there is still less justification for inferring from its provisions any such unlawful intention as would make it an offence under either s. 4 (1.) (a) or s. 7 of the Act. In substance it constitutes the shipping companies sole agents of the colliery proprietors for the purposes of their inter-State trade; the agents, as is not unusual in such cases, being responsible to their principals for the wholesale prices of the goods supplied, and being dependent for their own remuneration on the difference between the wholesale and retail prices. In contracts of this sort it is not uncommon to find a provision specifying the minimum retail price, a provision which might be very material from the standpoint of public interest. But there is no such provision in the present case. On the contrary, the agreement contains provisions specifying the maximum retail prices and imposing penalties if

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these prices be exceeded; and further it leaves it open to the shipping companies to compete with and undersell each other on the market. It is of course possible, if not probable, that the shipping companies had some arrangement between themselves precluding such competition, but there was no evidence whatever of any such arrangement. The inference their Lordships draw from the provisions of the shipping agreement fixing the maximum retail prices is that the colliery proprietors considered that it was not to their advantage that the shipping companies should unduly raise the price of coal to the ultimate consumer. It would give too great an advantage to their competitors in the coal trade. There is no ground for supposing that these maximum prices were intended to be minimum prices, or that if intended to be minimum prices they were necessarily excessive. Much stress was laid on those clauses of the agreement under which the colliery proprietors were not to sell coal for the inter-State trade to any persons other than the shipping companies, and the latter were not for inter-State purposes to purchase or carry coal for any persons other than the colliery proprietors. Similar provisions are quite common in contracts of exclusive agency, and, in their Lordships' opinion, are not necessarily unreasonable or injurious to the public. There is no evidence that the tonnage of the shipping companies was more than sufficient for their inter-State trade in coal, or that the effect of the agreement was to render their vessels idle. Of course the agreement precluded colliery proprietors not parties thereto from being able to avail themselves of these vessels. But a similar result follows whenever vessels are chartered by a single person or by a group of persons. The shipping companies were not the only persons engaged in the shipping trade in coal; they owned only about the same proportion of the total tonnage engaged in the Newcastle inter-State coal trade as the proportion of such trade represented by the parties to the vend agreement. So far as other colliery proprietors were concerned they were not by reason of the shipping agreement in any worse position than they would have been had the parties to the vend chartered all the vessels of the shipping companies, and, having regard to the exigencies of the inter-State trade, such action on the part of the parties to the

vend would have been quite reasonable. With regard to the other provisions of the shipping agreement, their Lordships are of opinion that they were really to the advantage of the consumers as tending to ensure a reasonably steady supply to meet the inter-State demand.

There being nothing on the face of the vend agreement or of the shipping agreement from which an intention to injure the public by raising the price of coal to an unreasonable extent can be inferred, the question remains whether these agreements, if considered together as parts of a single scheme, can give rise to an inference of any such intention. Their Lordships are of opinion that this question, too, must be answered in the negative. If, as their Lordships think, there was justification for a combination of colliery proprietors to raise the price of coal, it was obviously reasonable on their part to take precautions to secure a market for their coal at the increased price. They could do this in various ways. At one time they appear to have contemplated forming a company by the agency of which their coal would be distributed to the ultimate consumers, but they finally adopted the plan of appointing the shipping companies their exclusive agents for that purpose. On the other hand the shipping companies, if a vend were formed, would either have to purchase coal from the vend at increased prices or obtain their coal elsewhere with considerable risk of loss from an unsteady or insufficient supply and the introduction of fresh competitors in the shipping business. Some arrangement with the vend would be advisable in their own interest, and again it was not unreasonable that this arrangement should take the form of an agreement of exclusive agency. Their Lordships conclude that neither the vend agreement nor the shipping agreement taken separately, nor both agreements taken together as parts of a single scheme, can raise any legitimate inference that any of the parties concerned, whether colliery proprietors or shipping companies, acted otherwise than with a single view to their own advantage, or had any intention of raising prices or annihilating competition to the detriment of the public.

It remains to be considered whether, if no illegal intention can be gathered from the agreements themselves, such an intention

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can be inferred from what was actually done pursuant to the agreements. The selling price of the best coal, f.o.b. at Newcastle, was during the negotiations for the vend agreement raised from 7s. 6d. to 9s., and this price prevailed during the last months of 1906. It was under the vend agreement itself raised to 10s. for the year 1907, and 11s. for the year 1908 and subsequent years. It was contended that these prices were unreasonable and excessive, and Isaacs J. found as a fact that in 1907 9s. 1d. and in 1908, 1909, and 1910 9s. 8d. were the highest prices which could reasonably have been charged. On the other hand the Court of Appeal was of opinion on the evidence that the f.o.b. prices actually charged were not only not shewn to have been excessive or unreasonable, but were shewn affirmatively to have been reasonable. Their Lordships agree with the opinion of the Court of Appeal, and consider that the criticisms of the Chief Justice on the process by which Isaacs J. arrived at his conclusions of fact in this respect were fully justified. The onus of proving that the prices charged were unreasonable clearly lay with the Crown, and the Crown tendered no satisfactory evidence in this respect. There was no evidence whatever as to the profits made by the colliery proprietors when the prices in question prevailed. On the other hand there was evidence that with the hewing rate at 4s. 2d., which was admitted to be the lowest hewing rate consistent with a fair remuneration to the miners, and which corresponds to a declared price of 11s., the colliery proprietors could not afford to sell the best coal, f.o.b., at less than 11s. Further, there is evidence that the prices actually charged inter-State were also obtained in the foreign market, where at any rate free competition prevailed.

With regard to the prices charged c.i.f. or in the retail trade by the shipping companies there is, again, no satisfactory evidence that they were not perfectly reasonable prices. The shipping companies do not appear to have raised the c.i.f. or retail prices even to the maximum prices they were entitled to charge as between themselves and the colliery proprietors. There is no evidence as to the profits they made either before or after the shipping agreement came into operation. The most noticeable instances of a rise in c.i.f. or retail prices after the

agreement came into operation are in the case of sales in Melbourne and Adelaide, where the shipping companies had been suffering from the competition of J. & A. Brown & Co. There is, in their Lordships' opinion, no justification for the assumption that the c.i.f. or retail prices which prevailed early in 1906 were prices which ensured to the shipping companies a reasonable profit in respect of the carriage and distribution of the coal, or that, assuming this and making proper allowance for the rise in f.o.b. prices, the c.i.f. or retail prices charged in subsequent years were unreasonable. As pointed out by the Chief Justice, the rise in the f.o.b. prices is only one of the many considerations which would be material in forming an opinion as to whether an increase in c.i.f. or retail prices was justifiable.

As to the other modes in which it was said that the public were injured by reason of the agreements in question, their Lordships consider that, even if there were ample proof of the injury alleged, no inference could be drawn therefrom as to the intention of the parties in entering into these agreements. The parties to the agreements might gain by raising the price of coal, but they could gain nothing by putting difficulties in the way of their own customers. Such inconvenience as from time to time arose did not exceed what was to be expected from time to time in the conduct of so great a business.

Finally, it was contended that a sinister intention might be inferred from the policy of the colliery proprietors and shipping companies towards their competitors in the coal trade, and great stress was laid in this connection on the efforts made to bring the Burwood Extended, the Lymington, and the Newcastle Wallsend Collieries into the combination, and to check the competition of Scott, Fell & Co. and Kethel & Co. Their Lordships do not think that it would be proper to draw any inference from this policy as to the intention of the parties in entering into the agreements in question: the policy pursued is in no way foreshadowed or contemplated in either agreement, nor was it the necessary outcome of either agreement. It must not, however, be supposed that their Lordships view with approval everything which was done in pursuance of this policy.

In their Lordships' opinion the decision appealed against was

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right, first, because so far as the Crown relied upon s. 4 (1.) (a) and s. 7 of the Act there was no evidence (at any rate no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and secondly, because so far as the Crown relied on s. 10 there was no evidence (at any rate no sufficient evidence) of injury to the public.

Their Lordships desire, in conclusion, to acknowledge the assistance which they have received from counsel on both sides in a case of much difficulty and complexity.

Solicitor for appellants: *J. H. Galbraith.*

Solicitors for respondents: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

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BRITISH COLUMBIA ELECTRIC RAILWAY
 COMPANY, LIMITED } APPELLANTS;
 AND
 STEWART AND OTHERS RESPONDENTS.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal Clauses Act, 1896 (59 Vict. c. 55, British Columbia), s. 64—Charter bestowing Right, Franchise, or Privilege—Statutory Powers to construct and operate Railway—Agreement with Municipality—Consent of Electors—Validity of By-law—Repugnancy between Statutes of same Year—Later Chapter to prevail.

The appellant company had powers under the Consolidated Railway Company's Act, 1896, to construct and operate a street railway or tramway in certain districts in British Columbia along such streets or roads as might be specified by the council of any municipality through which the same might be constructed, who might fix the location and terms of user over such streets or roads. By an agreement between the appellant company and the corporation of Point Grey, which was within the districts referred to, the corporation consented to the appellant company constructing a tramway along specified roads and, upon certain conditions,

* *Present*: VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

operating the same for forty years. The agreement also provided that if the corporation or other persons should desire thereafter to construct a tramway along other roads the appellant company should have, upon certain conditions, a prior right to construct and operate it. A by-law of the corporation authorized the affixing of the corporate seal to this agreement:—

Held, that the agreement and by-law did not amount to a charter bestowing a right, franchise, or privilege within the meaning of the Municipal Clauses Act, 1896, s. 64, and that they were not invalid in the absence of the assent of the electors referred to in that section.

Held, further, that if there was a repugnancy between the Consolidated Railway Company's Act, 1896, and the Municipal Clauses Act, 1896, the former, being the later chapter of the Statutes for that year, should prevail.

APPEAL by special leave from an order of the Court of Appeal (November 29, 1911) and from a judgment of the Court of Appeal (December 15, 1911) reversing a judgment of the Supreme Court (February 27, 1911).

The Consolidated Railway Company was a company originally incorporated under the name of the Consolidated Railway and Light Company by the Consolidated Railway and Light Company's Act, 1894 (c. 56 of the Statutes of British Columbia, 1894), which was amended by the Consolidated Railway Company's Act, 1896 (c. 55 of the Statutes of British Columbia, 1896), whereby the name of the company was changed to the Consolidated Railway Company. Under s. 33 of the last-mentioned Act the Consolidated Railway Company was authorized and empowered to construct and operate a street railway in certain districts of British Columbia along such roads as might be specified by any municipality through which the same might be constructed, who should fix the location and terms of user of the railway thereon. Under s. 41 the company was given power to use and occupy such streets and roads as might be required for the purpose of its railway track provided that the consent of the council of any municipality, when within such municipality, were first obtained, who were thereby authorized to grant permission to the company to construct its railway and to use and occupy streets for that purpose upon such conditions as to plan of construction, and for such period, as might be agreed upon between the company and such council.

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The Consolidated Railway Company issued debentures under the powers contained in their Act and in 1896 made default thereon. The trustees for the debenture-holders, under powers contained in the trust deed contemplated by the Act, entered into possession of the whole of the undertakings, franchises, rights, powers, contracts, privileges, and other assets of that company, and by a deed of conveyance dated April 3, 1897, sold and conveyed the same to the appellant company, the British Columbia Electric Railway Company, Limited.

On September 10, 1910, the corporation of the municipality of Point Grey passed a by-law, being the Electric Tramway By-law, 1910, No. 15, authorizing the execution of an agreement between the corporation of Point Grey and the appellant company. By the said agreement, which recited the above Act, the corporation consented to the appellant company constructing and operating within that district, and on conditions contained in the agreement, for a period of forty years the electric railway or tramway described in the agreement. This agreement provided, inter alia, that in the event of the municipality or others desiring thereafter to construct a street railway or tramway along other streets or roads within the municipality, the appellant company was under certain conditions to have a prior right to construct and operate such other railway or tramway. The material sections of the Consolidated Railway Company's Act, 1896, and the material clauses of the agreement are fully set out in the judgment.

In October, 1910, W. F. Stewart and three other persons, electors of the corporation and municipality of Point Grey entitled to vote, made separate applications to the Supreme Court of British Columbia to quash this by-law. The ground of their application was that the by-law was a "grant bestowing a right, franchise or privilege" upon the appellant company within the Municipal Clauses Act, 1896, s. 64, and that it was invalid, not having been submitted to the electors nor assented to by three-fifths of those voting, as provided by that section. The section is fully set out in the judgment at pp. 824, 825. An order directing the corporation of Point Grey to shew cause having been made on November 9, 1910, the applications were heard on January 27, 1911, by Morrison J.,

who on February 27, 1911, gave judgment dismissing them. The applicants appealed to the Court of Appeal. During the hearing of the appeal the appellant company applied to be added as parties and to be heard, which application was refused. On December 15, 1911, the Court of Appeal (Macdonald C.J.A., Irving J.A., and Galliher J.A.) delivered judgment allowing the appeal and quashing the by-law. The Court of Appeal granted leave to the corporation to appeal, but the corporation failed to prosecute an appeal. The appellant company on March 26, 1912, obtained special leave to appeal against the order of the Court of Appeal refusing to add the appellant company as parties and against their judgment of December 15, 1911, the two appeals being consolidated by the order. The appeal was argued on March 6, 1913, and re-argued on July 2 and 3, 1913.

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Sir R. Finlay, K.C., and Tyrrell T. Paine, for the appellants. The appellant company being parties to the agreement ought to have been made parties to the proceedings to quash the by-law. The agreement was not a grant of a charter bestowing a right, franchise, or privilege, nor was it otherwise within the Municipal Clauses Act, 1896, s. 64. The appellant company derived its rights and powers from the Consolidated Railway Company's Act, 1896; the effect of the agreement was merely to prescribe the manner in which those rights and powers were to be exercised and was restrictive in character. The clauses of the agreement did not go beyond the matters mentioned in s. 39 of the Consolidated Railway Company's Act, 1896, as within the powers of the corporation under that Act. If there is any repugnancy between the provisions of the Consolidated Railway Company's Act, 1896, and the Municipal Clauses Act, 1896, then the former Act as c. 55 of the Statutes of that year is to be presumed to be later in date than the latter Act, which is c. 37, and should consequently prevail: *Moore v. Robinson* (1); *Morisse v. Royal British Bank*. (2) A general Act, even if later in date, cannot prevail over an Act specifically granting power.

The respondents did not appear.

(1) (1831) 2 B. & Ad. 817.

(2) (1850) 1 C. B. (N.S.) 67.

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The judgment of their Lordships was delivered by

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LORD ATKINSON. These are appeals by special leave from two orders of the Court of Appeal for British Columbia, dated November 29, 1911, and December 15, 1911, respectively.

By the first of these orders leave was refused to the British Columbia Electric Railway Company, Limited, styled in the case the appellant company, to be added as parties in an appeal then pending in the Court of Appeal in which four electors of the municipality of Point Grey in British Columbia were appellants and the corporation of Point Grey were respondents, and to intervene and prosecute the same. By the second the Court of Appeal allowed an appeal against an order of Morrison J., dated February 27, 1911, and decided that a certain by-law passed on September 10, 1910, by the corporation of Point Grey, styled the Electric Tramway By-law, 1910, No. 15, should be quashed as invalid on the ground that it was either ultra vires or had not received the assent of the electors of the municipality.

Since special leave to appeal was obtained a new by-law, to practically the same effect as the first, has been passed by the corporation of Point Grey, submitted to a poll of the electors, and approved of by them, but upon the terms that the right of the appellant company to prosecute the appeals which they had obtained special leave to prosecute should not thereby be affected. Neither the corporation nor any of the electors appeared on the hearing of the appeals before their Lordships. The particular feature of the by-law which, it was contended, necessitated its submission to the electors for their approval was this, that it, in effect, granted by charter to the appellant company "a right, franchise or privilege" within the meaning of the 64th section of the Municipal Clauses Act, 1896, of British Columbia. The sole question for decision is whether this construction of the agreement is right.

The facts so far as material to the decision are as follows. Some distance to the south-east of the city of Vancouver, in British Columbia, is situate on the Fraser River the city of New Westminster. To the west of the former city, at the extreme end of the promontory which forms the southern boundary of

English Bay, is situate the municipality of Point Grey. The appellant company was incorporated by the Consolidated Railway and Light Company's Act, 1894, and given powers to acquire the franchise, rights, properties, and privileges of other companies. In exercise of these powers it acquired by purchase the property, rights, powers, and privileges of three companies, namely, the New Westminster and Vancouver Tramway Company, the Vancouver Electric Railway and Light Company, Limited, and the North Vancouver Electric Company. In the year 1896 the Consolidated Railway Company's Act (Statutes of British Columbia, 1896, c. 55) was passed to amend this Act of 1894, to change the name of the appellant company into that of the Consolidated Railway Company, to confirm these purchases, and to vest in the appellant company under its new name all the property, rights, privileges, powers, and franchises of the three aforesaid companies. This statute, in addition, by ss. 33, 39, 41, 52, and 53 enacted, as far as is material, as follows:—

Sect. 33. "The company is hereby authorised and empowered to construct, maintain, complete, and operate a single or double track street railway, tramway or railway, with all necessary switches, side tracks and turn-outs, and all other requisite appliances in connection therewith, upon and along such streets within the cities of Vancouver and New Westminster as the mayor and council of the said cities respectively may direct, and under and subject to any byelaws of the corporation of the said cities made in that behalf, and also to construct and maintain a tramway or tramways, railway or railways, between the said cities of Vancouver and New Westminster, and in the districts adjacent to the said cities, and over and upon such lands as the company may acquire, and along such road or roads between the limits of the said cities as may be specified by any municipality through which the same may be constructed."

Sect. 39. "The council of any municipality in the Province of British Columbia and the company are hereby respectively authorised, subject to the provisions of this Act, to make and to enter into any agreement or covenant relating to the construction of the said railway for the paving, macadamizing, repairing and grading of the streets or highways, and the construction, opening

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of, and repairing of drains or sewers and the laying of gas and water pipes in the said streets and highways, the location of the railway, and the particular streets along which the same shall be laid, the pattern of rails, the time and speed of running the cars, the amount of fares to be paid by passengers, the time in which the works are to be commenced, the manner of proceeding with the same, and the time for completion, and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic."

Sect. 41. "The company shall have full power and authority to use and occupy any, and such parts of any, streets and roads and highways as may be required for the purposes of its railway track, the laying of the rails and the running of its cars: Provided always, that the consent of the council of any municipality, when within such municipality, and of the Chief Commissioner of Lands and Works for the time being of the Province of British Columbia, when the streets, roads, and highways are not within a municipality, respectively, shall be first had and obtained, who are hereby respectively authorised to grant permission to the company to construct its railway as aforesaid within their respective limits across and along, and to use and to occupy, the said streets or highways, or any part of them, for that purpose, upon such conditions as to plan of construction, and for such period or periods as may be respectively agreed upon between the company and such council or the Chief Commissioner of Lands and Works aforesaid."

Sect. 52. "The company shall have the power to enter into and conclude any agreement with any other tramway or railway company, or any corporation, for leasing or selling to them the property, real or personal, rights, contracts, privileges, powers, and franchises of the company, or any part thereof, or for the working or managing of any of its lines of railway, or for running powers over the same, or any part thereof: Provided that such agreement shall be approved of by two-thirds in value of the shareholders at any special meeting called for that purpose."

Sect. 53. "The company shall have power to enter into contracts with any person or persons, corporation or corporations, and with

any municipality in the said Province, for building and equipping street railways and for lighting the streets of any municipality and supplying it or them with power and heat, and any such contract shall be valid and binding for the term of years thereby agreed upon on the company and any such person or persons, or any municipality, corporation or corporations, so contracted with."

The powers conferred by these enactments on the appellant company are very wide. The 33rd and 41st sections are somewhat obscurely worded. They purport to deal with five different classes of railway lines. It was not suggested by Sir Robert Finlay, who appeared for the company, that it was intended by the framers of this Act that municipalities in districts adjacent to either of these cities should not have power to specify the roads, streets, and highways, within their limits, upon which railways should be laid, and it would appear to their Lordships that the construction of these ambiguous sections which would confer this power upon them should, if possible, be preferred. They think it is possible, and that the sections can, without doing any violence to their language, be so interpreted. The learned Chief Justice, apparently, held that the statute only authorized the company to construct lines of railway in those districts adjacent to one or other of the two cities which lay between those cities. His words as reported are: "The same section (i.e., s. 33) also confers upon the respondents power to construct and operate tramways in the districts adjacent to the said cities, but does not expressly confer any rights to construct its lines over the streets and highways of such adjacent districts other than such as lie between the limits of the said two cities. The rights given over streets or highways by the said section are confined to the said cities and to streets lying between them." Their Lordships cannot adopt this view, as they understand it. They think, as has already been indicated, that where the lines of railway are constructed in districts adjacent to either of the cities, though not lying between them, and are laid along or across the roads, streets, or highways situate within the limits of a municipality, the governing body of that municipality have vested in them all the powers conferred by these sections, in that behalf, upon municipal authorities.

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The governing body concerned in the present case is the corporation of Point Grey, and the lines of railway with which the case is conversant are admittedly laid along streets and highways within that municipality. In their Lordships' view the effect of s. 33 is to confer upon and vest in the appellant company every power, privilege, franchise, and right necessary to enable them to construct their lines of railway along any of the streets, roads, and highways within the limits of the municipality of Point Grey. They think that the 41st section enables the company to use and occupy wholly or partly such of these streets, roads, and highways as may be necessary for the purposes of their railway, and that both sections combined vest in the company all the powers necessary to enable them to operate these railways when constructed.

These very wide powers, privileges, and franchises are, however, limited and restricted in their use and exercise in three different directions. First, by the provision requiring the consent of the corporation to be given to the exercise of the company's powers; secondly, by the provision giving to the corporation the right to specify the streets and highways along which the rails shall be laid; and thirdly, by the provision that the corporation may dictate the manner in which and the terms upon which the railway shall be constructed and operated. These powers of the corporation are, however, of a restrictive, not of a donative, character. They do not enable the corporation to give, grant, or confer any right, power, or privilege whatsoever upon the company. Their only function is to circumscribe, or impose conditions upon, the exercise by the company of the rights, powers, and privileges already conferred upon it by the Legislature.

It was not, as their Lordships understand, contended that a by-law merely expressing the consent of the corporation to the construction by the company of a railway or tramway over the particular streets or highways in Point Grey selected by the corporation itself, and nothing more, would, under the provisions of s. 64 of the Municipal Clauses Act, 1896, require the approval of the electors. That section runs thus: "Notwithstanding any law to the contrary a municipal council shall not have the power to grant to any person or corporation any particular privilege or

immunity or exemption from the ordinary jurisdiction of the corporation, or to grant any charter bestowing a right, franchise, or privilege, or give any bonus or exemption from any tax, rate or rent, or remit any tax or rate levied or rent chargeable unless the same is embodied in a by-law which, before the final passage thereof, has been submitted to the electors of the municipality who are entitled to vote upon a by-law to contract a debt, and which has received the assent of not less than three-fifths in number of the electors who shall vote upon such by-law. Any such by-law which does not receive the assent of the electors as aforesaid shall not be valid."

It was, however, decided by the Court of Appeal that the corporation had by clause 31 of an agreement in writing entered into between them and the company on September 10, 1910, touching the construction by the company of their tramway or railway upon certain specified streets in the municipality of Point Grey, done or attempted to do an act prohibited by this section, namely, had granted a charter bestowing upon the company "a right, franchise or privilege" within the meaning of the section. The by-law held to be invalid authorized the reeve and clerk of the corporation to affix the corporate seal to this agreement. This was duly done. If the corporation have by this instrument bestowed "a right, privilege or franchise" on the company within the meaning of this section, the so-called by-law, which is in reality merely a resolution passed by the corporation, is admittedly invalid, since it never was submitted to the electors as required.

This agreement is a very lengthy document. It commences by reciting that under ss. 33 and 41 of the Consolidated Railway Company's Act, 1896, the company are authorized and empowered to construct and maintain a tramway along such roads in the districts adjacent to the cities of Vancouver and New Westminster as may be specified by the council of the municipality in which these roads and highways are situate on the terms to be fixed by that body. It proceeds to recite that full power and authority are given to the company to use and occupy any parts of the streets, roads, and highways in the municipality as may be required for the purpose of its railway track, the laying of

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its rails, and the running of its cars, provided the consent of the council (i.e., the corporation) be first had and obtained, and that the latter body had full power to give such consent upon such conditions as to plan of construction and for such period or periods as might be agreed between them. It further recites that the corporation had requested the company to construct and operate an electric street car system within the district of Point Grey, which the company have expressed their willingness to do on the terms and conditions thereafter stated, and then proceeds to provide that the council, in exercise of the powers conferred upon it by the statute of 1896, consents to the company's constructing and, for a period of forty years from the date of the execution and delivery of the indenture, operating an electric street railway or tramway of the kind therein described on the terms therein mentioned, the intention being that they should confer upon the company the consent of the corporation to use the said streets and no other interest therein. These terms are on the whole in their effect very onerous on the company.

The portion of article 31 of the agreement which is relevant runs thus: "31. In the event of the corporation or any other person or persons or body or bodies corporate proposing or being desirous of constructing a street railway or street railways on any of the streets within Point Grey other than those upon which the company shall have constructed a street railway or have a street railway in course of construction in accordance with the provisions herein contained, the company shall be requested in writing to build such desired or proposed railway and operate the same upon the terms and conditions in this agreement contained, and the company shall within sixty (60) days thereafter notify the corporation whether it is willing to build and operate such street railway, and in the event of the company refusing or neglecting within sixty (60) days from such request to signify its willingness to build and operate on any of said streets, or in the event of the company neglecting or refusing to commence the building of such railway on any of the said streets within six months after expiration of the said sixty (60) days, or to complete same within twelve (12) months from the date when it signified its willingness to build and operate such railway, the corporation

shall then have the right to construct and operate the entire line specified on any such street as shall not have been constructed."

This article does not in the opinion of their Lordships confer upon the company any authority or power to make any tramway or railway in any street. The company already possessed all necessary power and authority for that purpose. It got them from another source. The corporation could, if so disposed, have uno flatu by one deed consented to the exercise by the company of their powers over every street then existing in the municipality or thereafter to be constructed there, or they could have given that wide consent from time to time by successive documents. What they have done by this agreement is to give their consent to the exercise by the company of their powers over some streets, with a covenant that in certain events and under certain circumstances they will consent to the company exercising their powers over other and additional streets, thus giving them a kind of preference over competitors, should an expansion of the railway system be determined upon. This may or may not be a prudent bargain for the corporation to make. It may enable the company to earn great gains and profits by the exercise of its statutory powers and privileges, but neither the Court of Appeal nor their Lordships have any concern with such matters. The sole question for their decision is the validity of the by-law in point of law. By the 39th article of the agreement it is expressly provided that it shall not be taken or construed so as to confer "any exclusive right or powers on or to the said company."

Article 42 of the agreement, providing that the agreement itself was to enure for the benefit of and be binding on the assignees of the company, was absolutely necessary, as s. 52 of the Consolidated Railway Company's Act, 1896, expressly confers upon the company the power to lease or sell their undertaking and all their contracts, privileges, franchises, and powers to any railway or tramway company or corporation. That power, like the others, was conferred by the Legislature. The Consolidated Railway Company's Act, 1896, and the Municipal Clauses Act, 1896, were passed in the same session of the British Columbian Legislature, but the latter was chapter 37 of the Statutes of that year, and the former chapter 55 and presumably later in date.

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If there is a repugnancy between them the later statute must prevail: *Moore v. Robinson*. (1) The Municipal Clauses Act, 1896, was re-enacted in 1906, but this does not effect a repeal of the Railway Act not repealed by the statute which has been re-enacted.

Their Lordships are therefore, with all respect to the learned judges of the Court of Appeal, unable to concur with them. They think that the agreement and by-law of September 10, 1910, did not amount to a charter bestowing a "right, franchise, or privilege" on the company within the meaning of the 64th section of the Municipal Clauses Act, 1896, that the by-law impeached was therefore valid, and the judgments and decisions appealed against were erroneous and should be reversed, but without costs, and they will humbly advise His Majesty accordingly. There will be no costs of these appeals.

Solicitors for appellants: *Linklater, Addison & Brown*.

[PRIVY COUNCIL.]

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ON APPEAL FROM THE HIGH COURT OF JUSTICE FOR
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Execution—Fieri Facias—Unpatented Mining Claim in Ontario—Seizure and Sale—Mining Act of Ontario (Stat. of Ontario, 8 Edw. 7, c. 21)—Execution Act (Stat. of Ontario, 9 Edw. 7, c. 47).

Under a writ of fieri facias against the "goods and chattels, lands and tenements" of a judgment debtor, his undivided interest in a mining claim, in respect of which (under the Mining Act of Ontario, 1908) a certificate of record has been issued but no patent granted, is liable to seizure and sale.

APPEAL, by special leave, from a judgment of the High Court (August 30, 1912) affirming a decision of the Mining

* *Present*: LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) 2 B. & Ad. 817, at pp. 821, 822.

Commissioner of Ontario. The question for decision in the appeal was whether an interest in an unpatented mining claim in Ontario was or was not exigible under a writ of fieri facias.

On September 29, 1911, the Farmers' Bank of Canada obtained judgment against the respondent Wishart for \$53,552, and on the same day issued thereon to the sheriff a writ of fieri facias against his goods, chattels, lands, and tenements in accordance with the law in Ontario. At this date the respondent was the duly registered holder under the Mining Act of Ontario of a five-sixths interest in a mining claim in the Porcupine Mining Division and within the bailiwick of the sheriff. The respondent Wishart held a certificate of record for his said interest, but no patent had been granted or applied for in respect of the said claim. At the instance of the appellant Clarkson, the liquidator of the Farmers' Bank of Canada, the sheriff on October 31, 1911, proceeded to sell the respondent Wishart's interest in the said mining claim, the sale being made as of a chattel and not as of land. The appellant Forgie purchased at the sale and presented to the Recorder for the Porcupine Mining Division a deed of sale executed by the sheriff. This deed the Recorder refused to record. By a transfer dated October 17, 1911, the respondent Wishart purported to sell and transfer to the respondent Myers the whole of his interest in the said mining claim according to the form prescribed by the said Mining Act. This transfer was recorded by the Recorder on December 12, 1911.

From the decision of the Recorder refusing to register his deed of sale from the sheriff, the appellant Forgie appealed to the Mining Commissioner of Ontario. He lodged a claim dated February 2, 1912, in accordance with the said Mining Act, claiming to be recorded as the owner of five-sixths of the mining claim and to set aside the transfer by the respondent Wishart to the respondent Myers on the ground that it was fraudulently made with intent to defeat creditors. The respondent Myers by his notice of dispute, while denying the facts alleged, raised the point of law that the interest of the respondent Wishart being an interest in an unpatented claim was not exigible under a writ of fieri facias, and that if it was it should have been

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sold as land and not as a chattel. It was agreed that this point of law should be decided as a preliminary issue. On April 16, 1912, the Mining Commissioner gave judgment against the appellant Forgie on the ground that the respondent Wishart was, under the provisions of the Mining Act of Ontario, merely a tenant at will of the Crown, and that as such his interest was not exigible.

The appellants appealed to the Divisional Court, who, by their judgment dated August 30, 1912, affirmed the decision of the Commissioner and dismissed the appeal, substantially on the same ground and also on the ground that the transfer by the sheriff was not effective as it did not comply with the requirements of s. 73 of the said Act in that it was not signed by the recorded holder. On January 22, 1913, a patent for the said mining claim was issued to the respondent Myers, and the appellants had filed a caution with regard thereto under the Lands Title Act (1 Geo. 5, c. 28).

Under the Mining Act of Ontario the owner of a mining claim before a patent is issued has the following rights:—(a) under s. 35 to work the same and transfer his interest to another; (b) under s. 59 to have his claim recorded; (c) under s. 64 to have a certificate of record, which under s. 65, in the absence of fraud or mistake, confers on him an absolute title; (d) under s. 88, upon his death, the Commissioner may make an order vesting the claim in his representatives; (e) under s. 106, upon performance of 204 days' work and the making of certain payments, to obtain a patent from the Crown for the rights comprised in the mining claim. It is, however, provided by s. 68 of the Act that until he obtains a patent the holder of a certificate of record "shall be a tenant at will of the Crown in respect of the mining claim." This section is set out in full in the judgment at p. 835.

Sir R. Finlay, K.C., Archibald Read, and M. L. Gordon, for the appellants. The interest of the respondent Wishart was one liable to execution under the writ of fieri facias, and was properly sold as a chattel interest in land. The holder of an unpatented mining claim has under the Mining Act of Ontario, ss. 35, 59,

64, 65, and 106, rights which constitute a valuable interest in property. The provisions of ss. 84—88 shew that the Legislature regarded the rights as valuable. There is nothing in that Act which prevents an unpatented claim from being subject to the liability to be taken in execution under the general law. The provision in s. 68 that until the issue of a patent the holder of a certificate of record shall be a tenant at will of the Crown defines only the holder's position relatively to the Crown; the substance of the section is that the holder has the right to proceed to obtain a patent. The provision in s. 73 requiring transfers to be signed by the recorded holder or his agent, upon which the decision appealed from was in part based, relates only to voluntary transfers and cannot affect the right to seize in execution. The rights of the appellants are not affected by the fact that in 1913, after the decision appealed from, a patent in respect of the claim was issued to Myers. It was issued in error as to the rights of the parties, and can be avoided by a declaration in an action brought for that purpose: *Florence Mining Co. v. Cobalt Lake Mining Co.* (1) The interest of the respondent Wishart was, under the Execution Act (Stat. of Ontario, 9 Edw. 7, c. 47), s. 9, as amended by s. 34 of the Ontario statute 1 Geo. 5, c. 12, bound by the writ from the time it was delivered to the sheriff for execution. The interest in land of a judgment debtor as a licensee under the Crown Timber Act (R. S. Ont., 1897, c. 32) was held to be liable to execution in *McPherson v. Temiskaming Lumber Co.* (2) The respondent Wishart's interest in the mining claim was a limited interest in land in the nature of a chattel interest, and was properly sold under the rules applicable to chattels, and not as land.

J. M. Godfrey, for the respondents. The decision in *McPherson v. Temiskaming Lumber Co.* (2) is distinguishable, as under the Crown Timber Act, 1897, there is a specific grant of exclusive possession to a licensee thereunder, whereas s. 68 of the Mining Act provides that the recording of a mining claim shall not confer any title or interest other than the right to proceed to obtain a patent. It is admitted that where a judgment debtor has an interest in land as to which he has a right of

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(1) (1909) 18 Ont. L. R. 275, at p. 284.

(2) [1913] A. C. 145.

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possession and a right of transfer, that interest is ordinarily exigible. Here, however, s. 68 expressly provides that the interest of the holder of an unpatented claim is that of a tenant at will, and as such the authorities shew it cannot be taken in execution. The respondent Wishart's interest could at any time be terminated by the Crown under s. 68, and could, under s. 82, at any time be abandoned by him. The statute 2 Geo. 5, c. 8, s. 7, amending s. 77 of the Mining Act, provides that a writ of execution shall bind the interest of the execution debtor in a mining claim from and after the entry upon the record of a note of the execution. This amendment presupposes that the interest of the holder before the issue of a patent was not exigible.

The Mining Act by s. 182 under the head of "Lien for Wages" provides that the Mechanics' and Wage Earners' Lien Act (R. S. O., 1897, c. 153) shall apply; if an unpatented claim is subject to execution this provision is unnecessary having regard to that of R. S. O., 1897, c. 32, s. 3. The Commissioner and the High Court were right in holding that the absence of a transfer signed by the holder was under s. 73 fatal to the appellants' contention. Both that section and s. 106 shew that the right to apply for a patent is purely a personal right belonging to the recorded holder. Further, if the interest of Wishart was exigible it should have been sold as land, not as goods; the procedure applicable to the sale under an execution of goods (r. 875) is materially different from that in the case of a sale of land (rr. 877, 879 and 881), and the sale was not regular under the latter rules. The decision in *McPherson v. Temiskaming Lumber Co.* (1) shews that an interest in land of the kind under discussion falls under the rules applicable to land.

The appellants were not called upon to reply.

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The judgment of their Lordships was delivered by
LORD SHAW OF DUNFERMLINE. This is an appeal by special leave from the judgment of the Divisional Court of the High Court of Justice of Ontario dated August 30, 1912, which affirmed

(1) [1913] A. C. 145.

the judgment of the Mining Commissioner for that Province dated April 16, 1912. That officer held that the interest of the respondent Wishart in a mining claim was not exigible under a writ of fieri facias against his lands and goods.

The facts are very simple. Wishart was the holder of an undivided interest in a certain mining claim. He had complied with the provisions applicable to prospecting, staking out his claim, and applying to have it recorded; and he had in point of fact received a certificate of record. All this was duly done under ss. 34, 35, 53, 59, and 64 of the Mining Act of Ontario, 1908. Wishart having thus his interest in the mining claim—an interest the nature of which will be afterwards analysed—the Farmers' Bank of Canada, who were Wishart's creditors for \$53,552, on September 29, 1911, obtained a judgment against him for that sum. On the same day there was issued to the sheriff on that judgment a writ of fieri facias against his goods, chattels, lands, and tenements. The form is not objected to; it correctly followed the provisions of the Execution Act. Although Wishart at the date of that execution was, as stated, the duly recorded holder of a mining claim under the Act, no patent had been granted to him in respect thereof.

About three weeks thereafter Wishart, plainly seeking to avoid as against his mining claim the effect of the execution as laid on, purported to sell it to the respondent Myers. At the end of the same month, namely, on October 31, the sheriff at the instance of the appellant Clarkson, who is the liquidator of the execution creditor, proceeded to sell the execution debtor Wishart's interest in the mining claim. The sale took place, but the Recorder refused to record. His principal ground for doing so was that there had not been, in his view, a compliance with the statute, by reason of the absence of any duly executed transfer from Wishart himself. So far it is manifest that Wishart, by failing to execute a transfer to his creditor and by selling to a third party and ignoring the execution already laid on, had been enabled to defeat the execution creditor's rights and to part with something of value which he found it to his interest to dispose of and a third party found it to his interest to acquire.

This is the true nature of the case before the Board. The
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J. C. subsequent facts, so far as the question now at issue is concerned,
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The purchaser at the execution sale was Mr. J. M. Forgie. On making application to the Recorder, that official, as mentioned, refused to record the sale deed from the sheriff. Mr. Forgie appealed from that decision to the Mining Commissioner. And he lodged a notice of claim on February 2, 1912, in accordance with the Mining Act. He claimed to be recorded, and further asked that the transfer by the execution debtor, Wishart to the respondent Myers of October 17, 1911 should be set aside. The ground stated was that the transfer was fraudulently made with the intent to defeat the appellant and the other creditors of Wishart. In the course of the litigation it was agreed, in the language of the Mining Commissioner, that "the question whether or not Wishart's interest in the mining claim was exigible and, if so, whether it should be sold as land or as chattels, should first be disposed of, Mr. Bayne admitting that if either of these points were decided against him, his client's claims must be dismissed."

The case before the Board was accordingly taken upon the footing that the only question to be determined was whether the interest in a mining claim duly recorded, but not yet the subject of a patent, was exigible for a judgment debt due by the claimant. Or in another form—and one of great general importance in the development of industrial enterprise—the question is whether the interest of a mining claimant at this stage of his operations is unavailing as a source of credit for a secured advance. There may be questions as to whether the actual form of sale should have complied with the provisions as referable to land or referable to chattels. But whatever the form of sale adopted, the question is whether the respondents can have any interest which they could set up in conflict with the seizure in execution made before any sale by the judgment debtor.

The principles of law applicable to a case of this character were fully laid down in *McPherson v. Temiskaming Lumber Co.* (1) The question there dealt with had reference to the nature of the interest in timber lands of a licensee, and the

circumstances of the case—an attempt to ignore and to defeat the execution creditor's rights—were closely analogous to those of the present. It was held that “the nature of the title of a licensee is a title (it may be limited in character) to the land itself and, in their Lordships' opinion, accordingly it falls within the scope of the Execution Act.” The case followed *Glenwood Lumber Co. v. Phillips* (1); and the judgment of Lord Davey therein as to the effect of the right of exclusive occupation, subject to reservations and restrictions, seems also applicable in terms to the case now before the Board.

The Mining Commissioner affirmed the refusal to record the sheriff's deed, and this judgment was, on August 30, 1912, affirmed in the Divisional Court of Ontario. The decision of the *Temiskaming Case* (2) by this Board was later in date, and the views taken by the learned judges in the Courts below do not coincide with those which were here laid down. But it may be mentioned that in the Divisional Court it was held that the holder of an unpatented mining claim had no interest higher than those of a tenant at will. And there seems no reason to doubt that the provisions of s. 68 of the Mining Act demanded and received careful consideration from the Court below. That section provides as follows: “The staking out or the filing of any application for, or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim other than the right to proceed, as in this Act provided, to obtain a certificate of record and a patent from the Crown; and prior to the issue of a certificate of record the licensee shall be merely a licensee of the Crown, and after the issue of the certificate and until he obtains a patent he shall be a tenant at will of the Crown in respect of the mining claim.”

Their Lordships are agreed in thinking that the section does not constitute an exhaustive enumeration of the rights of the holder of an unpatented mining claim, and they deem it necessary to give a reference to the other sections of the statute to shew how conclusively this is so. They are further of opinion that the reference to tenancy at will is a reference

(1) [1904] A. C. 405.

(2) [1913] A. C. 145.

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dealing solely with the relations of the claimant to the Crown before the Crown has parted by patent with the Royal rights. But such denomination, in their view, cannot be allowed to destroy the substance and reality of the rights in the claimant as against other subjects of the Crown if such rights be in truth conferred by the Act. That they are so conferred is clear from the following provisions. Under s. 35 a licensee before patent may work the staked-out lands and transfer his interest therein to another licensee. Under s. 59 a licensee who has so staked out his claim has the right to make application for a free grant and to have his claim defined and recorded. Under s. 64 provisions are made for the granting of a certificate of record, and under s. 65 it is provided that after a certificate "the mining claim shall not, in the absence of mistake or fraud, be liable to impeachment or forfeiture except as expressly provided by this Act." It is somewhat difficult to imagine anything more substantial. Then after s. 68, which has been already referred to, stipulating that before patent the claimant should be a tenant at will of the Crown, there come the following sections. Sect. 72 provides: "A transfer of an unpatented mining claim, or of any interest therein, may be in Form 11, and shall be signed by the transferor or by his agent authorised by instrument in writing." Sect. 73 states the pre-requisites for recording instruments. Sect. 74 provides that after a claim has been recorded "every instrument other than a will affecting the claim or any interest therein shall be void as against a subsequent purchaser," &c. Sect. 77 makes careful provisions for the recording of orders and judgments, and that the filing of a certificate shall be actual notice to all persons of the proceedings. The whole of the latter provisions just mentioned seem radically inconsistent with a mere tenancy at will. But when it is added that, by s. 88, where the claimant dies even before the recording of the claim, or where he dies before the issue of a patent, no other person shall without leave of the Commissioner be entitled to acquire any right, privilege, or interest in respect thereof within twelve months after his death, and when there then follow these words, "and the Commissioner may within twelve months make such order as may seem just

for vesting the claim in the representatives of such holder," nothing could, in their Lordships' opinion, more conclusively negative the limitation to a tenancy at will.

Their Lordships have thought it right to enumerate these sections so as to shew that, in their view, the reference in s. 68 to a tenancy at will from the Crown must be taken in conjunction with the whole of the other provisions of the statute, and that on a full view of these no substantial doubt can remain that the interest of a mining claimant in an unpatented claim falls, in the language of the Execution Act of Ontario, within the category of "lands," subject, as in the *Glenwood Case* (1) and the *Temiskaming Case* (2), to restrictions, to possible forfeitures, but also capable of transfer and of becoming vested in successors after death.

As to the point that no transfer in writing executed by the plaintiff himself has been made, and that therefore no record could take place, their Lordships would be slow to hold—if the true nature of the execution debtor's rights be what has been above described—that the lack or refusal of his signature should render ineffective against his property the course of law in execution for debt. Reference, in the opinion of the Board, may be usefully made to the powers conferred upon the Commissioner by s. 123, providing for claims, rights, and disputes being settled by him. The section goes on to say that "in the exercise of the power" he "may make such order and give such direction as he may deem necessary for making effectual and enforcing compliance with his decision." The section particularly refers to questions and disputes in respect to unpatented mining claims, including this, namely, whether such an unpatented claim "has before patent been transferred to or become vested in any other person."

Even apart from the statute, the Ontario officials and Courts might well have been considered vested with a power to restore against such a defeat of the law as would have been occasioned by the want, or, say, by the refusal, of the signature of an execution debtor. But under s. 123 of the Mining Act such a power appears to be conferred in sufficiently wide terms. The writ of execution, in short, should have been treated as the equivalent of a transfer and recorded as such.

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(1) [1904] A. C. 405.

(2) [1913] A. C. 145.

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Their Lordships will humbly advise His Majesty that the judgments of the Courts below should be reversed and that the interest of the respondent George Wishart in the unpatented mining claim was seizable in execution by his judgment creditor, and that, the defence of the respondents to the claim of James M. Forgie being unfounded, Mr. Forgie was entitled to be recorded as claimed by him. The respondents will pay the costs of the proceedings throughout, including the costs of the petition to dismiss the appeal as incompetent, which petition His Majesty will be humbly advised should be dismissed.

Solicitors for appellants : *Lee & Pembertons.*

Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

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THE GRAND TRUNK RAILWAY COMPANY. DEFENDANTS;
AND
MCALPINE (SINCE DECEASED) AND ANOTHER. PLAINTIFFS.
ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC.

Canadian Railways—Level Crossings—Duty to sound Whistle—Duty to warn Persons—Shunting Engine—Breach of Statutory Duty—Cause of Damage—The Railway Act (R. S. of Canada, 1906, c. 37), ss. 274, 276.

The Railway Act (R. S. of Canada, 1906, c. 37), s. 274, provides that “when any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.” The same Act by s. 276 provides that “whenever in any city, town or village any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train . . . which is then foremost a person who shall warn persons standing on or crossing or about to cross the track of such railway” :—

Held, (1.) that s. 274 does not apply to an engine engaged in shunting and never being in the course of its work more than eighty rods from any level crossing which it crosses ;

(2.) that under s. 276 it is necessary only that the warning should be

* *Present* : VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, and LORD MOULTON,

such as ought to be apprehended by a person of ordinary faculties in a reasonably sound, active, and alert condition, and that the time given to avoid the danger should be reasonably sufficient to enable a person of that description to avoid it ;

(3.) that in an action for damages for personal injuries a plaintiff relying on the breach of a statutory duty must prove not only the breach, but also that the breach caused the injuries.

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APPEAL from a judgment (November 25, 1911) of the Court of King's Bench for the Province of Quebec affirming a judgment (October 11, 1910) of Demers J. at the trial of the action with a jury.

The action was brought by the respondent McAlpine to recover damages from the appellant company for personal injuries which he alleged he had suffered owing to the negligence of the appellants whereby he was knocked down by an engine at a level crossing in the city of Montreal.

The facts, which involved a consideration as to the meaning and applicability of the Railway Act, ss. 274 and 276 (set out in the head-note), are sufficiently stated in the judgment of their Lordships.

The case came on for trial in October, 1910, before Demers J. and a jury. By their verdict the jury, after finding that the accident was caused by the common fault of the plaintiff and of the defendant company's servants, found that the respondent had suffered \$9000 damages, but that this sum should be reduced by \$2500 owing to his contributory negligence. Judgment was accordingly given for the respondent for \$6500. In the Province of Quebec the English law as to contributory negligence is not applicable, and the appellants made no complaint as to the findings in so far as instead of finding contributory negligence as a defence they merely made it a matter of reduction of damages. Judgment was given accordingly for the plaintiff for \$6500 and costs.

The learned judge in his summing up stated that he left it to the jury to consider whether s. 274 had been complied with. He did not deal with the question whether that section was in law applicable to the facts of the case. With regard to s. 276 he directed the jury that a warning to persons at the level crossing was no good unless it was proved that it was heard by

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the plaintiff and that he had time to act upon it. As to the alleged breaches of the statutory duties imposed upon railways both by s. 274 and by s. 276, the learned judge did not point out to the jury that in order that the plaintiff should recover they must be satisfied not only that there was a breach by the defendants of their statutory duties, but that there was a breach which caused the accident.

The appellant company appealed to the Court of King's Bench for the Province of Quebec. The appeal was heard on November 25, 1911, and was dismissed, leave to appeal to His Majesty in Council being given subsequently. The appellants in the present appeal prayed that judgment should be entered for them in the action, or that a new trial should be ordered.

Atkin, K.C., and *E. F. Spence*, for the appellants.

Macmaster, K.C., and *Harold Smith*, for the respondents.

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment dated November 25, 1911, of the Court of King's Bench for the Province of Quebec (Appeal side), whereby a judgment, dated October 11, 1910, of Demers J. in favour of William H. McAlpine, deceased, for a sum of \$6500 and costs was affirmed. This sum was the amount of the damages awarded to McAlpine by the verdict of the jury in an action instituted by him against the appellants in respect of injuries he sustained by being knocked down and injured by one of their locomotive engines. The action was founded on the negligence of the company's servants. During the proceedings McAlpine died, and the suit has been revived in the name of the added respondents, one of whom, Dame E. Cauzeneuve, is his widow. During the hearing of this appeal, on the first occasion, their Lordships were clearly of opinion that on several points the jury had been so misdirected by the learned judge who presided at the trial that the verdict could not be allowed to stand, and that a new trial should be directed.

Neither the company nor the respondents very much desired this course; but the company were in this difficulty, that rules and principles of law had been laid down by Demers J. in his

charge to the jury, and approved of by the judgment of the Court of King's Bench, which they insisted were erroneous, and would embarrass and prejudice them in the conduct of the business of their railway, so that while perfectly ready and willing to entertain favourably any suggestion for the amicable settlement of the claim of the respondents, they could not do so unless their Lordships could see their way to express the opinions they had formed upon the different directions of the learned trial judge which in their view would necessitate a new trial of the action.

Their Lordships gave to the appellants the assurance that the course they desired would be followed. The case has been compromised, and it only remains for their Lordships to express their views on the directions complained of. To make these views intelligible it is necessary to refer briefly to the material facts of the case. Guy Street, in the city of Montreal, is crossed on a level at right angles by two main tracks and two side tracks of the appellants' railway. The side tracks are the outer tracks at each side of the line. They are siding tracks, and the two inner tracks main tracks, the northern main track carrying west-bound traffic and the southern east-bound. These tracks also cross several streets running parallel to Guy Street, and situated some short distance from it east and west. In their order of proximity to Guy Street on the west there are Richmond Street, St. Martin's Street, and Seigneur Street, and on the east in the same order Luisignan Street and Versailles Street. All these six streets are comparatively close together, each being separated from the other by a distance much less than a quarter of a mile. There is no curve in the railway as it crosses these streets, and any one crossing them at Guy Street has a clear view up and down the line for some considerable distance.

On the morning of October 12, 1908, an engine and tender belonging to the company were engaged in shunting operations in connection with the work being done in a yard also belonging to them called Bonaventure Yard, and for that purpose were running backwards and forwards on the northern siding track. The morning was fine, and there was nothing abnormal in the state of the atmosphere. McAlpine, who lived in the vicinity on the southern side of the line, and was well acquainted with the

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place where the accident was alleged to have occurred, was, about 9 A.M., in the act of walking up Guy Street and crossing the tracks from south to north, on his way to his employment, when he was struck by the tender of this engine then being driven backwards and proceeding eastwards towards Bonaventure Yard. The speed of the engine was about five or six miles an hour. A gate is erected at each side of the line across Guy Street. They are sixty feet apart, and the actual width of the track is forty-six feet. McAlpine "ducked" under the gate on the southern side and proceeded to traverse the lines in a north-westerly direction. He must have crossed three of the lines of rails and the whole or part of the northern side track before he was struck. The engine carried three men at the time of the accident, an engineer and a fireman on the body of the engine, and a man named Dowden, a coupler, who was standing on the footboard of the tender. There was some dispute whether there were not cars on the southern side track at this time, but McAlpine apparently admits that there was an opening between these cars opposite Guy Street. Two sections of the Canadian Railway Act were relied upon as imposing on the company certain statutory duties which their servants, it was alleged, had negligently omitted to perform.

The first, s. 274, runs thus: "When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such a crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway."

And the second, s. 276, thus: "Whenever in any city, town or village any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train or of the tender of the engine which is then foremost a person who shall warn persons standing on or crossing or about to cross the track of such railway."

Having regard to the plan which has been put in shewing the proximity of these several streets one to the other, and the nature of the work in which the engine was engaged, their Lordships

think that the former section cannot apply to the state of things existing at the time this accident occurred. The engine only ran west to Richmond Street about 100 yards. It then reversed, and was coming back towards the yard. It never was more than about 100 yards from any one of these streets. The statute evidently contemplates the case of a train which approaches a level crossing from a greater distance than eighty rods or a quarter of a mile, and cannot apply to an engine engaged in shunting, which, though according to the definition clause of the statute is a train, yet does not in its work get eighty rods away from any one of these level crossings. It was, moreover, proved by the men on the engine and tender that, though no whistle was sounded, their bell, which rings automatically, was kept ringing constantly from the time they left Bonaventure Yard till the happening of the accident.

As to the statutory duty imposed by the second section, Dowden, the coupler, deposed that he was on the tender to make couplings if necessary and attend to switches, that he first saw McAlpine about thirty feet west of Guy Street, that his engine was then going about five or six miles an hour, that when he came a little nearer to McAlpine he (Dowden) saw that McAlpine was paying no attention to the bell, that he (Dowden) immediately thereupon shouted to McAlpine, gave to the engineer a signal to stop, and again shouted to McAlpine, that the engine stopped in its own length, but that McAlpine came on and apparently paid no attention and was struck, the engine being then practically on the Guy Street crossing. The fireman and engineer corroborated Dowden's evidence. This was the evidence given on behalf of the company to prove the discharge by them of their statutory duties towards the plaintiff McAlpine. The latter's account of the accident was this: He said there were cars on the southern side track, that when he passed through the opening left between these cars opposite Guy Street the remaining three tracks were quite free and open to him, that there were men in front of him passing over the tracks whom he was following, that after he had passed the first track he "threw his eyes quickly up and down the main line" but did not see anything approaching from either side, that he did not see the engine that struck him

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while he crossed over the main tracks and the spaces between them, that he heard a shout, and got a blow before he could turn his head, that he must have been then on the track. He further stated that he did not hear any whistle or bell, but apparently declined to swear that the bell was not ringing.

That was the important evidence with which the presiding judge had to deal in his summing up to the jury, and it is upon his treatment of it that the question of misdirection turns. Now, as to s. 274, he stated simply that he would leave to the jury the question whether according to the evidence the company obeyed "the dispositions" of that section. He said nothing about the applicability of the provision as to whistling to shunting operations such as those carried on on this occasion, or as to whether the omission to whistle or to ring the bell—if they believed it did not ring—was the sole effective cause of the accident, or was so connected with it as to be a cause materially contributing to the accident. As to s. 276, he told the jury that the article stipulated that the company was obliged to have somebody to warn people, that this person must not only be in a position to warn, but must also warn people who are standing on or about to cross the line, that he must warn in time, that it was not the engineer or the fireman who has to give the warning, and that their notice was no good unless it was proved that it was heard by the victim and he had time to act upon it.

In their Lordships' view this last direction is erroneous, it is not necessary for the protection of the company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active, and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient for such a person as the one above mentioned to avoid it. If a company permits persons whose faculties it knows to be defective to cross its line, that knowledge may, possibly, impose upon them the duty to take greater care than would be required towards the ordinary wayfarer who is not so affected. But that case does not arise here. McAlpine was at the time of the accident only fifty-one years of age, and was employed as a book-keeper. His health, he said, was perfectly

good, and there was no suggestion that his faculties were in any way defective.

The second question left to the jury was framed thus: Was the accident caused by the sole fault of McAlpine? And the third, Was it caused by the sole fault and negligence of the company or its employees? The jury answered both these questions in the negative. The fourth question put by the learned judge to the jury ran as follows: Was the accident caused by the common fault of the plaintiff and the defendant, its servants and employees, and if you answer "Yes," state in what the fault and negligence of each consisted? To this question the jury gave the following answer: "The plaintiff was to be blamed in not taking sufficient precautions in crossing the track, and the employees of the defendants are to be blamed for not blowing the whistle, and the man on the footboard for not giving the plaintiff timely warning according to law." It is in reference to this question, it appears to their Lordships, that the learned judge fell into some grave errors in addition to those already mentioned. For instance, he said: "A party who crosses a railway is obliged to look, there is no doubt about that, but to what extent he is obliged to look is a question which is disputed. It seems to be considered now that it is sufficient if a party . . . looks both ways on approaching the track. He need not necessarily look again just before crossing. That is the English law."

This is an entirely erroneous view of the English law. Whether, in a case of this character, the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line or lines of railway looks both ways on approaching the track, he need not look again just before crossing it. Neither is it true, as the learned judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shewn that the defendant could by the

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exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence. Again he said: "So far as the contestation is concerned it is not that there was not a man there. I do not think it is in the contestation that there should have been a man there. The real point at issue is that there was no warning, and this absence of warning consisted in the fact that they did not whistle, and that there was no warning from a man on the tender. These are the two faults which you can find against the company, and you may find them guilty of only one or both of them."

The answer of the jury to the fourth question was evidently based on this direction. Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. If, as in the example taken by Lord Cairns in *Dublin, Wicklow and Wexford Railway v. Slattery* (1), the folly and recklessness of the plaintiff, and not the admitted negligence of the company, be the cause of the injury to the plaintiff, then the negligence of the servants of the company in omitting to whistle, for instance, as the train approached a station or level crossing would "be an incuria, but not an incuria dans locum injuriæ." In *Davey v. London and South Western Ry. Co.* (2) this principle was applied.

In the last passage quoted from the charge of the learned judge in the present case, he did not point out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the

(1) (1878) 3 App. Cas. 1155, at p. 1166.

(2) (1883) 12 Q. B. D. 70.

company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed. Since the parties have arrived at a compromise, their Lordships have now, however, only to intimate that they will humbly advise His Majesty that the appeal ought to be allowed.

Solicitors for appellants: *Batten, Proffitt & Scott.*

Solicitors for respondents: *Hills, Godfrey & Halsey.*

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MEYER & CO., LIMITED PLAINTIFFS;

AND

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INSURANCE COMPANY, LIMITED . . } DEFENDANTS.

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ON APPEAL FROM THE SUPREME COURT OF THE STRAITS
SETTLEMENTS (SETTLEMENT OF SINGAPORE).

Banker — Crossed Cheque — Payment — Exchange of Cheques — Ostensible Authority—Estoppel—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79.

The appellants' cashier presented at the respondents' bank cheques drawn on the respondents in favour of the appellants and crossed generally; in exchange he was handed cheques for the same amounts drawn by the respondents upon other banks and crossed generally. The appellants had by their conduct held out their cashier as having authority to deal with the cheques in this way. The cashier fraudulently paid the cheques handed him by the respondents to his own banking account and misappropriated the proceeds:—

Held, that the cheques drawn on the respondents were paid by the cheques given in exchange within the meaning of the Bills of Exchange

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD DE VILLIERS, LORD MOULTON, and SIR SAMUEL GRIFFITH.

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Act, 1882, s. 79, sub-s. 2, but that the appellants were estopped from denying the authority of their cashier to receive payment in that manner and were not entitled to recover damages.

APPEAL from a judgment of the Supreme Court (July 4, 1912) affirming a judgment of the Chief Justice of Singapore (January 22, 1912).

The appellants carried on business in Singapore as dealers in opium and other goods, and the respondents carried on business in that settlement as bankers. The appellants kept current banking accounts with a Dutch bank known as the Netherlands Trading Society, with the respondents, and with other banks in Singapore. One Abed was in the employment of the appellants as collector and cashier, and it was his duty to collect moneys due to them from their customers, and to pay the amount collected into one of their banking accounts. Abed had a banking account with the Netherlands Trading Society, and had also accounts at two other banks. Owing to the difficulty of understanding cheques drawn in the native character, it was the practice of the Netherlands Trading Society to refuse to collect for its customers cheques drawn upon the respondents.

On February 21, 1910, customers of the appellants delivered to them, in payment of a debt, a cheque for \$4200 drawn by them upon the respondents in favour of the appellants or bearer, and crossed generally. On the same day an employee of the appellants, acting under the directions of Abed, presented this cheque to the respondents at their bank, and the respondents handed to him a cheque for the same amount drawn by them on the Netherlands India Commercial Bank in favour of the appellants or bearer. This cheque Abed paid into his own account with the Netherlands Trading Society, and fraudulently appropriated the amount thereof. At subsequent dates three further cheques drawn on the respondents and crossed generally were received by the appellants from their customers and were exchanged by the respondents in the above manner, either by Abed or under his directions. In each case Abed misappropriated the amount of the cheque handed to him by the respondents. Upon the evidence referred to in the judgment their Lordships found as a fact that Abed had ostensible authority to receive the

respondents' cheques in exchange for the cheques presented by him or by his direction.

The appellants by their statement of claim delivered on April 26, 1911, claimed from the respondents \$18,069, the aggregate amount of the four cheques, as damages on the ground that they had suffered that loss in consequence of the respondents having paid the four cheques "otherwise than to a banker," in contravention of the Bills of Exchange Act, 1882, s. 79, sub-s. 2(1), which it was admitted applied in the Colony.

The Chief Justice, by his judgment delivered on January 22, 1912, dismissed the action on the ground that the proximate or effective cause of the loss which the appellants had sustained was the criminal misconduct of their own cashier, and not the payment of the cheques otherwise than to a banker, and that the damages claimed were accordingly too remote.

The Supreme Court, sitting as a Court of Appeal (Fisher J., Ebden J., and Sproule J.), dismissed the appeal, after having held by a majority (Sproule J. dissenting) that the appellants were precluded by the pleadings from claiming on the ground of wrongful conversion of the cheques.

Sir R. Finlay, K.C., and *Heber Hart*, for the appellants. The view taken by the trial judge, and apparently by the Supreme Court, that the damages claimed were too remote is erroneous. If correct it would render nugatory the protection intended to be afforded by the Bills of Exchange Act to a holder of a crossed cheque. The exchange of cheques was a payment within the meaning of s. 79, sub-s. 2, of that Act, and being made otherwise than to a banker the appellants are entitled to the damages

(1) The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79:

"(1.) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall require payment thereof.

"(2.) Where the banker on whom a cheque is drawn which is so

crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. . . ."

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claimed. There was no finding in the Court below that Abed had authority to receive payment by cheque, nor any evidence that he had authority to do so. Strong evidence would be required to justify a finding that he was held out by the appellants as having authority to deal with cheques in a manner so contrary to commercial usage. Abed exchanged the cheques to avoid the suspicion which would have arisen had he paid cheques drawn by the appellants' customers to his own account: *Hannan's Lake View Central v. Armstrong & Co.* (1) The respondents' failure to observe the provisions of s. 79 were therefore the direct cause of the loss. The necessary element of an estoppel, namely, an authorized representation of fact acted on by the other party, is not present.

Holman Gregory, K.C., and Ernest Charles, for the respondents. The respondents by giving other crossed cheques in exchange for the crossed cheques drawn upon them did not pay the latter within the meaning of s. 79, sub-s. 2; consequently there cannot be any cause of action under that section. In any event, however, the appellants by their previous conduct held out Abed as having authority to receive payment by another crossed cheque, and they are estopped from claiming damages arising from that method of payment having been adopted.

Sir R. Finlay, K.C., in reply.

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July 10.

The judgment of their Lordships was delivered by

LORD DE VILLIERS. This is an appeal from a judgment of the Supreme Court of the Straits Settlements affirming a judgment of the Chief Justice in favour of the defendants in the action. The plaintiffs were dealers in opium and other goods, and the defendants were bankers, and the claim was for \$18,069, being the total amount of four cheques drawn on the defendants in favour of the plaintiffs or bearer and crossed generally. The plaintiffs kept current accounts with the Netherlands Trading Society as well as with the defendants, and they had in their service as cashier and collector a man named Jacob Abed, who kept a current account on his own behalf with the Netherlands Trading Society. It appears that during the two years immediately

preceding that in which the four cheques now in question were drawn it had been a frequent practice in the plaintiffs' office for the plaintiffs' cashier, instead of receiving cash for cheques drawn on the defendants, to obtain from the defendants cheques of corresponding amounts drawn by them on another bank in favour of the plaintiffs or bearer and crossed generally. This was done because the Trading Society refused to collect for their customers cheques drawn upon the defendants. It further appears that during the two years just mentioned a considerable number of the cheques thus drawn by the defendants on other banks had been misappropriated by Jacob Abed, who paid the proceeds into his own current account with the Netherlands Trading Society. The four cheques now in question were dealt with in a similar way, and the plaintiffs in this action, relying upon the provisions of the 79th section of the Bills of Exchange Act, 1882, claimed the amount of these cheques as damages sustained owing to such cheques having been paid otherwise than to a banker.

The section enacts that "Where the banker on whom a cheque is drawn pays a cheque crossed generally otherwise than to a banker he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid." It was suggested to their Lordships in argument that there had been a mere exchange of securities and not a payment of the cheques in question, but they are clearly of opinion that the handing over to Abed of fresh cheques drawn by the defendants on another bank should in law be treated as payment to him.

In the view which their Lordships take of this case special circumstances exist which disentitle the plaintiffs to relief, not because the damages are too remote, as held by the learned Chief Justice, but because the plaintiffs are estopped from denying Abed's authority to receive payment of the cheques from the defendants. The point was distinctly raised by the defendants' statement of defence, and there are passages in the Chief Justice's reasons from which it might be inferred that he really supported this defence. There has, however, been no direct finding on the point, and their Lordships have given anxious consideration to

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the question whether the case should not be remitted to the Court below to decide whether Abed had or had not ostensible authority to receive the proceeds of the cheques from the defendants. It appears, however, that the chief witness who could throw further light on the matter has left the Colony, and as there is uncontradicted evidence on the record to support the existence of such ostensible authority, their Lordships feel justified in arriving at a decision without remitting the case for further evidence. The evidence of the witnesses for the defence clearly shews that the course of dealing between the plaintiffs and defendants before the presentation of any of the cheques in question was such as to justify the defendants in treating Abed as if he had authority to receive the proceeds of such cheques. But the case may be decided upon the evidence of the plaintiffs' own witness, Solomon Judah. He was assistant accountant and afterwards manager of the plaintiffs' business, and when he entered the service Abed was already in the plaintiffs' service as cashier and collector. In cross-examination Judah said: "Abed was implicitly trusted by the firm, and so far as I am aware no one checked his cash-book Abed was in sole charge of the cash. No special check was kept on the daily balance, but when it was too large I spoke to him about it." In examination-in-chief he said: "I did not know that the defendant bank was in the habit of exchanging crossed cheques drawn on itself for crossed cheques drawn by itself on other banks." In his re-examination, however, he made the very important admission that "Abed's duty was to collect the amount of our bills by cash, cheque, or in any other way." This last statement would go far to prove express authority on Abed's part to receive payment of the cheques in question, although crossed generally, but it is sufficient for the purposes of the present case to say that the evidence of the plaintiffs' own and only witness shews that their trusted cashier had ostensible authority to receive the defendants' cheques in exchange for the cheques presented by him or by his direction. This is essentially a case in which, as between two innocent persons, one of whom must suffer by the fraud of a third person, he should suffer who by his conduct has enabled such third person to occasion the loss. The plaintiffs must be presumed to have known the manner in

which the business of their own office was conducted; they placed Abed in sole charge of the cash, without exercising any effectual control over him, and they held him out to the world as their cashier and collector, with authority to collect the amounts of their bills by cheque, cash, or in any other way. They cannot, therefore, now be heard, as against the defendants, to say that the apparent authority with which they had clothed him was not his real authority. For these reasons their Lordships have humbly advised His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

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Solicitors for appellants: *Ford, Lloyd, Bartlett & Michelmores*.
Solicitors for respondents: *Whites & Co.*

[HOUSE OF LORDS.]

MAIR APPELLANT; H. L. (SC).*
AND
RIO GRANDE RUBBER ESTATES, LIMITED RESPONDENTS. July 18.

Company—Contract to take Shares—Rescission—Fraudulent Misrepresentation—Prospectus—Quotation in Prospectus of Report by one of the Directors—Responsibility of Company for Truth of Statements in Report.

A company formed for the purpose of acquiring a rubber estate issued a prospectus which quoted a report made before the incorporation of the company by one of the directors who was stated to be acquainted with the locality. The prospectus also stated that no portion of the price of the estate would be paid until the company had received an independent report confirming the statements of the director. The report stated that the estate contained wild rubber trees in such quantities that immediate profits were assured.

In an action brought by a shareholder against the company for rescission of his contract to take shares the pursuer averred by his condescendence that he had applied for the shares in reliance upon the statements in the prospectus and the report, and that he had since learned that those statements were false and fraudulent, and in particular that there was no rubber on the estate. The company pleaded

* *Present*: VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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that these averments were irrelevant to support the conclusions of the summons:—

*Held*, that the company was responsible, at all events, for the absence of fraud in the representations made by its agent, and that the pursuer was therefore entitled to a proof of his averments.

Per Lord Shaw of Dunfermline: *Prima facie*, a company which issues a prospectus embodying a report made by a director is responsible for the truth of, as well as for the absence of fraud in, the statements of fact contained in the report.

Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland, 1913 S. C. 183, reversed.

APPEAL against interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland. (1)

The respondents were a company incorporated under the Companies (Consolidation) Act, 1908, on February 28, 1910, and having their registered office in Glasgow; the appellant was a shareholder in the company.

On February 15, 1912, the appellant (hereinafter called the pursuer) brought an action against the company (hereinafter called the defenders) for rescission of his contract to take shares and repayment of the moneys paid by him therefor.

The pursuer averred (condescendence 2) that in or about the beginning of March, 1910, there was sent to him by or on behalf of the defenders a prospectus which stated that the company was incorporated under the Companies Acts with a capital of 70,000*l.* divided into 70,000 shares of 1*l.* each and was formed for the purpose of acquiring a concession to be obtained by the vendors from the Government of the Philippine Islands giving the exclusive right for twenty years to collect, work, and sell or export the rubber, gutta percha, and other forest products in a territory estimated to contain about 100 square miles (about 60,000 acres) in the Rio Grande Valley, situated in Mindanao, Southern Philippines; that the prospectus further set forth that Mr. C. A. Littler, late commercial agent in the East for the Government of Tasmania, was acquainted with the locality from long residence in the Philippines and reported in the following terms. The report, which was dated February 9, 1910, and was addressed to the directors of Rio Grande Rubber Estates, Limited, was then set

out in full. The material statements in the report were as follows :—

“The territory is very extensive, and is estimated to contain about 60,000 acres. . . .

“The area was a great centre for the collection of wild rubber until five years ago, when the Government cancelled all licenses, owing to damage done to rubber trees and vines. Since then, the area has been reserved, with a view to the formation of a responsible organisation which would undertake a scheme of collecting and re-planting. Even with the crude methods of extraction which then prevailed as much as 40,000 lbs. of rubber per month has paid royalty (only a little over one penny per lb.). In consequence of the Government not having allowed the rubber trees and vines to be tapped, they are now ripe for tapping on a large scale.

“Under an organised system of collection it should be easy to maintain an average annual output of wild rubber for the next seven years of at least 120,000 lbs., which with rubber at only 4s. per lb. should give a nett profit of not less than 12,000*l.* per annum, thereby providing an excellent return while the Para trees to be planted are maturing. After the fifth year, the combined revenues from wild and planted rubber will increase enormously, and at the end of ten years, with 2500 acres bearing, the nett profit, taking rubber at only 3s. per lb., should be about 64,000*l.* per annum. The estates are unique in my experience in respect that, in addition to the enormous possibilities of such a large territory if systematically developed, they contain wild rubber trees and vines in such quantities that immediate profits are assured. Under efficient and energetic management they cannot fail to yield large profits to the shareholders.”

The report concluded with a detailed estimate of profits up to the year 1919 and it was signed “C. A. Littler.”

The pursuer further averred that Mr. Littler was one of the directors of the company and was also the promoter or one of the promoters of the company.

Condescendence 3. “Said prospectus further sets forth ‘From the above report by Mr. Littler, it will be seen that an immediate profit of not less than 12,000*l.* per annum may be expected, out

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H. L. (Sc.) of which the directors propose to set aside each year a sum of  
 1913 5000*l.* for the further development of the property and the  
 MAIR general purposes of the company. This would leave a sum of  
 v. 7000*l.*, equal to a dividend of 10 per cent. on the total capital,  
 RIO GRANDE RUBBER which it is expected will be paid at the end of the first year after  
 ESTATES, the company has commenced operations on the property and  
 LIMITED, also in each of the five subsequent years, by which time the  
 planted rubber trees should be producing. During this period  
 a sum of 25,000*l.* would thus be provided for additional working  
 capital, which on the subscription of the present issue would  
 give a total working capital of 65,000*l.* This, the directors are  
 advised, is considered sufficient to plant and bring to bearing  
 about 2500 acres; and further, 'The statements in this pro-  
 spectus are based mainly on Mr. Littler's report, on information  
 furnished by him and the publications above referred to.' "

The pursuer further averred (condescendence 4) that on March 1, 1910, he applied for 200 shares which were duly allotted to him; that thereafter his name was entered on the register of share holders as the holder of 200 shares and a share certificate was duly issued to him; and (condescendence 5) that he paid in respect of the said shares sums amounting in cumulo to 100*l.*

Condescendence 6. "The pursuer applied for the said shares, allowed his name to be put on the register, accepted the said certificate, and made said payments in reliance on the statements contained in the said prospectus and report therein incorporated, and in the belief that they were true. He has recently learned that the said statements were false and fraudulent. In particular in the said prospectus it is (inter alia) stated that up to 1905 40,000 lbs. of wild rubber every month was got from the property which the company was acquiring, and that from 1910 (the year of the company's incorporation) onward there would be got from this property 120,000 lbs. of rubber annually. In point of fact there was no wild rubber or any rubber on said territory, or at all events such an insignificant quantity that it would not pay the cost of collection, and consequently there could be no income from this source from the property. The pursuer was induced to apply for shares in the company because of these false and fraudulent statements."

Condescendence 7. "Said prospectus, as a further inducement to the public to subscribe for shares, set forth that the directors would not part with any portion of the purchase price to the vendors until Mr. Littler's report had been confirmed by an independent report from their manager or other expert acting for them, and until the title to the subjects purchased had been delivered. The directors in direct breach of these representations paid over the whole of, or at least a great proportion of, the said price before obtaining either such a report or a good or any title to the property."

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The pursuer pleaded (*inter alia*):—

"1. The pursuer having been induced to become a shareholder in the said company by false and fraudulent statements contained in the prospectus of the company decree of reduction should be pronounced as craved. 2. The pursuer having entered into the said contract to take shares under essential error induced by the misrepresentations made in the prospectus is entitled to rescind the said contract and to decree of reduction as craved."

The defenders pleaded (*inter alia*):—

"1. (a) The pursuer's averments are irrelevant to support the conclusions of the summons, and *separatim*, they are insufficient in specification. 1. (b) The pursuer's averments in article 6 of the condescendence are irrelevant and ought not to be remitted to probation."

The Lord Ordinary (Lord Hunter) sustained the defenders' first plea and dismissed the action. The First Division of the Court of Session (the Lord President, Lord Kinnear, and Lord Mackenzie) adhered to the interlocutor of the Lord Ordinary.

1913. June 20. *Buckmaster, K.C.*, and *Condie Sandeman, K.C.* (with them *J. A. Christie*) (the two latter of the Scottish Bar), for the appellant. Where a company issues a prospectus embodying the report of an expert who is one of the directors who have signed the prospectus, and who is represented in the prospectus as a person having an intimate and special knowledge of the facts, it must accept responsibility for the truth of the statements contained in the report. The statements complained of were made by the respondents' accredited agent and were intended by the

H. L. (Sc.) respondents as an inducement to the public to take shares. The fact that Mr. Littler was a director of the respondent company differentiates this case from the case of a company putting forward a prospectus containing statements by somebody who had no power to speak on behalf of the directors, in which case the company could not be made liable unless it were shewn that it had adopted the statements. The mistake made by the judges of the Court of Session was that they overlooked the essential fact of the case, namely, the position of Mr. Littler as a member of the board. Possibly a prospectus might be so framed as to reserve to the company the right to escape from liability for the statements of its authorized agent, but that reservation must be put in plain language, especially where the agent is a director who signs the prospectus; and if this prospectus had given a note of warning to the public as to the credibility of the statements in the report it would have been useless for the purpose for which it was intended. Those statements are alleged to be both false and fraudulent, and at the least the respondents must be taken to have guaranteed the good faith of the statements. Further, the prospectus adopts the report because it bases the prospective profits of the company upon it.

The respondents are liable upon the principles laid down in *Lynde v. Anglo-Italian Hemp Spinning Co.* (1) and *Karberg's Case*. (2)

[VISCOUNT HALDANE L.C. referred to *Redgrave v. Hurd*. (3)]

*H. P. Macmillan, K.C.*, and *Thos. A. Gentles* (both of the Scottish Bar), for the respondents. Upon a fair reading of the prospectus the respondent company has not made to the prospective shareholder any statement of its own as to the character of this property. A report in a prospectus does not necessarily commit the directors to the truth of it. And here the note of warning is struck. In making an estimate of profits the prospectus says that it is based upon the report of Mr. Littler and it adds that the company will not part with one penny of its money until the report is verified. That is a warning that this

(1) [1896] 1 Ch. 178.

(2) [1892] 3 Ch. 1, at p. 13.

(3) (1881) 20 Ch. D. 1.

is a speculation and negatives the contention that the company has adopted the report in such a way as to make it its own. H. L. (SC.)

[LORD MOULTON. Can the company avail itself of the fraud of one of its directors?]

The company was being victimized as much as anybody else.

[VISCOUNT HALDANE L.C. referred to *Weir v. Bell*. (1)]

Further, the charge of fraud is not sufficiently specific. There is nothing but a general allegation of fraud which would not be admitted to proof.

[VISCOUNT HALDANE L.C. referred to *Derry v. Peek*. (2)]

*Buckmaster, K.C.*, replied.

The House took time for consideration.

July 18. VISCOUNT HALDANE L.C. My Lords, if the question in this appeal were one simply of procedure I should hesitate much before coming to a conclusion different from that of eminent judges in the Court of Session. But the point which has been decided is a point of substance and the interlocutor against which the appeal is brought purports to rest on principles which obtain equally in the jurisprudence of Scotland and of England.

The appellant raised an action for reduction of a contract to take shares in the respondent company, and for repayment of the price and deletion of his name from the register of shareholders. In his condescendence he averred that he had applied for his shares in reliance on the statements contained in a prospectus sent to him by the company, statements which were substantially to the following effect:—

That the company was formed to acquire a concession from the Government of the Philippine Islands of the exclusive right to the rubber in a certain territory; that Mr. C. A. Littler, who was one of the directors, was acquainted with this locality from long residence in the Philippines; that in a report addressed to the directors and made shortly before incorporation, and set out in the prospectus, he had said that the area was a great centre for the collection of wild rubber until five years previously, when

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(1) (1878) 3 Ex. D. 238, at p. 245.

(2) (1889) 14 App. Cas. 337.



H. L. (Sc.) the Government had cancelled the licences owing to damage done  
 1913 to rubber trees and vines ; and further, that since then the area  
 MAIR had been reserved with a view to the formation of a responsible  
 v. organization which would undertake a scheme of collection and  
 RIO GRANDE replanting ; that, even with the crude methods of extraction  
 RUBBER which then prevailed, as much as 40,000 lbs. of rubber per  
 ESTATES, month had been obtained, and that the rubber trees and vines  
 LIMITED. were now ripe for tapping on a large scale ; that under an  
 Viscount organized system of collection it should be easy to maintain an  
 Haldane L. C. average annual output of 120,000 lbs., which should give a net  
 profit of not less than 12,000*l.* a year, and that later on 64,000*l.*  
 a year might be obtained ; that in his (Mr. Littler's) experience  
 the estates were unique in that, in addition to the enormous  
 possibilities of such a large territory, if systematically developed,  
 they contained wild rubber trees and vines in such quantities that  
 immediate profits were assured, and that under efficient manage-  
 ment they could not fail to yield large profits to the shareholders.

The pursuer in his condescendence charged that these state-  
 ments were both false and fraudulent, and in particular that  
 there was no wild rubber or any rubber in the territory, unless  
 in quantities so insignificant that it would not pay to collect it.

It should be mentioned that the prospectus stated that no  
 portion of the price would be paid until the directors had received  
 an independent report from their manager or other expert acting  
 for them substantially confirming Mr. Littler's report.

The first plea in law of the defenders was that the pursuer's  
 averments were irrelevant to support the conclusions of his  
 summons, and that they were insufficient in specification. The  
 case went to the Procedure Roll, and the Lord Ordinary sustained  
 this plea in law and dismissed the action as irrelevant. The  
 appellant reclaimed to the First Division, but the Court—Lords  
 Dunedin, Kinnear, and Mackenzie—adhered and dismissed the  
 appeal.

The Lord President took the view that there was no statement  
 put forward in the prospectus as a statement of the directors  
 which could be said to be untrue. All that was stated was that  
 Mr. Littler had reported that there was a large amount of rubber  
 in the territory. The Lord President pointed out that the

prospectus particularly called attention to the fact that the statements were based on the report, and that the directors announced their policy of not paying the price until they had confirmation of its statements. This, he thought, shewed that they did not themselves vouch the truth of what Mr. Littler had said, and he held that there was no misrepresentation to any one who read the prospectus fairly and as a whole.

My Lords, I am unable to agree with the view taken by the Lord President. It appears to me to overlook that the appellant's averment in his condescendence is one not of mere misrepresentation, but of fraudulent misrepresentation. Of this charge the directors, including Mr. Littler, may be able wholly to clear themselves on a proof. But for the present purpose we have to assume the averment against them to be true. Taken as true, it means that the company induced the appellant to subscribe on the faith of a report which contained statements known to at least one of the directors, Mr. Littler, to be false and fraudulent. Can the company retain the money which Mr. Littler's statements, on the hypothesis that they were false and fraudulent, must be assumed to have induced the appellant to part with?

The report was made for the directors of the company, and the company placed it before the possible subscriber. To this extent, at all events, they adopted the statements it contained, but with what I will, for my present purpose, assume to be an important qualification to which I will refer presently. They invited the appellant to subscribe on the prospect these statements held out. They told him that they were made by one who was now a director, and who was acquainted with the locality from long residence in the Philippines, and that from what he reported large profits might be expected to be realized. They said that if any one subscribed he would, if he subscribed at once, have their assurance that his money would not afterwards be applied in paying the price unless they had first obtained a further and independent and favourable report. They, however, qualified their statements, as I will assume, to an extent to which I will now refer. They quoted Mr. Littler's report in the prospectus as one made to them before incorporation, and

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presumably before he became a director. I will assume that they thus made it clear that the statements of Mr. Littler were his statements and not theirs. But none the less they put forward these statements, subject only to the qualification I have mentioned, in order to induce the appellant to subscribe. My Lords, if the statements be falsely and fraudulently made, I do not think that they can keep the money subscribed, on the assumption which the appellant must be taken to have made, and which he was entitled to make, that Mr. Littler was reporting honestly. They appear to me to have adopted his action, in making his report, to the extent, at least, of putting the report forward as one which possible subscribers might treat as a something worthy of consideration, as an opinion tendered to them with the authority and concurrence of his colleagues, and by a director who might be assumed to be a person whose sincerity at all events was not in doubt.

In *Weir v. Bell* (1) Bramwell B. lays down as a general principle that "every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract." This statement by Bramwell B. was cited with approval by Lord Macnaghten in giving the judgment of this House in *Lloyd v. Grace, Smith & Co.* (2) It is true that it was made as an explanation of the real foundation of the law on a different point, the principle laid down in *Barwick v. English Joint Stock Bank* (3), in which Willes J. had decided that a corporation was liable for the fraud of its agent. But I think it embodies a broad proposition which is not now disputable, and which applies at all events in the absence of some much more extended and precise limitation of responsibility than was expressed in the present case. The representation here was a continuing one, and the company authorized it to be put forward as made by Mr. Littler, and if it was false and fraudulent on his part the company which authorized it to be made can no more retain money subscribed on the faith of it than it could had the whole board of directors been guilty.

(1) 3 Ex. D. 238, at p. 245.

(2) [1912] A. C. 716, at p. 737.

(3) (1867) L. R. 2 Ex. 259.

My Lords, I think the Scottish procedure in deciding questions of relevancy a very valuable one. But I doubt whether this procedure can often be easy to apply satisfactorily when the issue is one of fraudulent misrepresentation. I express no opinion on whether the learned judges of the First Division would have been right had there been no allegation of fraud. I am not, indeed, quite sure that in the case of a contract to take shares induced by a prospectus, a case in which the applicant is entitled to place full reliance on the impression which he can fairly derive from the various statements read together, the directors ought not to be held, on materials such as those before us, to have conveyed a view of the value of Mr. Littler's report which, if it turns out to have been untrue in fact, would entitle the appellant to rescission. But it is unnecessary to discuss this hypothesis, for fraud is distinctly charged, and if the appellant can establish fraud he is, in my opinion, for the reasons I have given, entitled to succeed. The directors of the company, including Mr. Littler, may be absolutely innocent of the charge. There is nothing before us to lead us to believe that they are guilty. But the question is at this stage one of relevancy only, and on this question I think the Courts below have come to a wrong conclusion.

I therefore move that the interlocutors appealed against be reversed, and that the cause be remitted to the Court of Session with a declaration that the appellant is entitled to a proof of his averments. The respondent company must pay the costs of these proceedings here and in the Courts below.

LORD SHAW OF DUNFERMLINE. (1) My Lords, the respondent company was incorporated on February 28, 1910. On March 1 it issued a prospectus. On March 7, the appellant having applied for 200 shares, these were allotted to him. He was put upon the register, and he made payments of instalments and calls to the amount of 100*l*. He says that he became a shareholder "in reliance on the statements in the said prospectus and report therein incorporated, and in the belief that they were true." He adds that "he has recently learned that the said statements were

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(1) Read by Lord Parker of Waddington.



H. L. (SC.) false and fraudulent." In these circumstances he seeks for reduction or rescission of the contract, and he asks back his money.

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For the purpose of a discussion on the relevancy of a Scotch case there are two elementary rules of procedure, namely, that (1.) the pursuer's averments must be taken *pro veritate*, and (2.) they must be sufficiently specific, so as to disclose to the defender, not the minute particulars, but the real substance of the facts making up the case against him. This being done, it is open to the defender, under the short and simple plea of "no relevant case," to maintain that, even on the assumption that the pursuer had proved in evidence all that he has set forth, yet he would not be entitled in law to succeed. Upon that plea being sustained the action is dismissed.

It is difficult to overestimate the value of this procedure to Scotland. Under it the scandals which sometimes appear elsewhere are avoided—of a trial taking place involving a prolonged, harassing, and most costly inquiry upon an issue which, if it had been stated to begin with in plain words and there and then adjudicated upon, would have been settled in the same sense for a fraction of the expense and in a fraction of the time. And, my Lords, in view of what one of your Lordships has observed, I deem it right to add that I think this procedure has a special value in cases where fraud is alleged. For under the second branch of the rule persons charged with fraud know from the beginning the substance of what they have to meet, and they are not exposed to the hardships of a merely fishing or raking inquiry.

It remains, of course, true that the value of the procedure would, on the other hand, be lost if the Court made such a meticulous examination of the averments as to leave or deny the solid ground of a case because of the absence of technical formalities of expression. That does not happen in Scotland: and under the ample facilities for amendment it happens less than ever. In the present case nothing of the kind has occurred, and one has only to read the judgment of the learned Lord President to see with what complete breadth and fairness the pursuer's averments have been construed. The case has been

decided, not upon any narrow survey of these, but upon quite another ground. That ground is this—that the prospectus itself was neither false nor fraudulent; that although it did embody a report from a Mr. Littler, it did not warrant or adopt the accuracy of that report, but, on the contrary, reserved it for confirmation, after the applicant had joined the company, but before money had been paid over to the vendors.

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To turn to the facts of this case as averred by the pursuer, it was not denied at the Bar that the case must be taken upon the footing that the pursuer was induced to apply for shares in the company because of false and fraudulent statements, which at least appeared within and formed part of the contents of the prospectus. By that document it was stated that the company had been formed for the purpose of acquiring a concession, to be obtained from the vendors, from the Government of the Philippine Islands, giving the exclusive right for twenty years to gather rubber, &c., in about 100 square miles of territory in the Rio Grande Valley.

The prospectus then proceeds to embody a report, which is quoted textually. Two paragraphs from that report are here cited:—

“The area was a great centre for the collection of wild rubber until five years ago, when the Government cancelled all licences owing to damage done to rubber trees and vines. Since the area has been reserved, with a view to the formation of a responsible organisation which would undertake a scheme of collecting and replanting. Even with the crude methods of extraction which then prevailed as much as 40,000 lbs. of rubber per month has paid royalty (only a little over one penny per lb.). In consequence of the Government not having allowed the rubber trees and vines to be tapped, they are now ripe for tapping on a large scale.

“Under an organised system of collection, it should be easy to maintain an average annual output of wild rubber for the next seven years of at least 120,000 lbs., which with rubber at only 4s. per lb. should give a nett profit of not less than 12,000l. per annum.”

H. L. (Sc.)      The paragraph need not be further proceeded with. It narrates  
 1913      that these estates are unique in the reporter's experience, and  
 MAIR      that they contain wild rubber trees and vines in such quantities  
 v.      that immediate profits are assured. The prospectus then pro-  
 RIO GRANDE      ceeds to quote other reports and pamphlets, and in a later  
 RUBBER      passage it says this: "From the above report by Mr. Littler it  
 ESTATES,      will be seen that an immediate profit of not less than 12,000*l.*  
 LIMITED.      per annum may be expected," and it further sets out calculations  
 Lord Shaw of      shewing the attractiveness of the investment. In a still subse-  
 Dunfermline.      quent passage it is stated: "No portion of the price will be paid  
                          until the directors have received an independent report from  
                          their manager, or other expert acting for them, substantially  
                          confirming the statements in Mr. Littler's report, and until the  
                          title to the subjects purchased has been delivered." And towards  
                          the conclusion of the prospectus this occurs: "The statements  
                          in this prospectus are based mainly on Mr. Littler's report, on  
                          information furnished by him, and the publications above  
                          referred to."

If the report which is quoted be treated as part of the prospectus itself and as part of the inducement to the investing public to take shares, there can be no doubt that this prospectus was not confined to setting out expectations or beliefs. The report makes broad averments of fact, that until five years ago the area was a great centre for the collection of wild rubber; that it has been reserved with a view to the formation of a responsible organization; that the trees are now ripe for tapping on a large scale; and that while it was being worked five years ago 40,000 lbs. of rubber per month had paid royalty. The representation of a future yield may be put on one side; but it is manifest from the statements quoted as to Mr. Littler's report being the basis of the prospectus, that the directors treated it as true, and founded upon its truth as the basis of attractive recommendations to the public.

The case, my Lords, of the pursuer is that these statements were false and fraudulent. He also says: "In particular, in the said prospectus it is, *inter alia*, stated that up to 1905 40,000 lbs. of wild rubber every month was got from the property which the company was acquiring, and that from 1910 (the year of the

company's incorporation) onward there would be got from this property 120,000 lbs. of rubber annually. In point of fact, there was no wild rubber, or any rubber, on the said territory, or at all events such an insignificant quantity that it would not pay the cost of collection, and consequently there could be no income from this source from the property."

The learned Lord President puts this averment in a manner which I entirely adopt when he says of the pursuer, "He avers and offers to prove that there is really for commercial purposes no wild rubber at all in the territory, and that, therefore, the idea of getting 120,000 lbs. of rubber and 12,000/. a year of profit is entirely chimerical." Put in a word, the pursuer's averments amount to this, that the whole story (and therefore the whole scheme) was a complete hoax.

In these circumstances it is necessary to inquire what was the position of the directors with reference to this report, or rather, to put the more elementary question, who was Mr. Littler? It must, my Lords, be remembered that this is an action for rescission. Were it an action for compensation or damages, the liability of promoters, directors, or persons held out as about to become directors, for statements made in the prospectus, would be, no doubt, regulated by the rules set down in s. 84 of the Companies Act of 1908, but in an action for rescission in which the company stands defendant the cardinal rule as to the prospectus is very simple. Each and every director is the agent of the company to make the representations which the prospectus contains, and to induce applications for shares on the basis of those representations.

The question, therefore, is again repeated (for I have a fear that the significance of the answer thereto has not been sufficiently regarded in the Inner House) who was Mr. Littler?

In view of the decision of the Court below,—that the pursuer is held to have no relevant case for reduction of this contract or refund of his money because the directors did not personally make the representations, but only quoted these as from a report made to them,—it is, my Lords, somewhat startling to remember that Mr. Littler was himself a director. He was the associate of the others on the board and he was a signatory of the prospectus

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H. L. (SC.) itself. My Lords, I am of opinion that in these circumstances  
 1913 Mr. Littler, in signing this prospectus, acted as the other directors  
 MAIR did, namely, as the agent of the company, and that the company  
 v. must answer for the truth of, and absence of fraud in, the  
 RIO GRANDE representations made by him.  
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I do not deny that it would be possible for directors to apprise the public frankly in a prospectus that they dissociate themselves from one of their own number, and that with regard to him no warranty was given of the truth of what he represented or reported. This would make a peculiar document; but it might be done. Yet the doing of such a thing would require to be in the most clear and unambiguous terms, so as to constitute a specific warning to investors against doing that which otherwise anything under the hand of a director as such would warrant them in doing, namely, relying upon its accuracy and complete good faith. When such a prospectus comes, if ever, to be framed, Courts of law will no doubt scrutinize it.

In the present case, my Lords, there was no such dissociation, either of the company or of the general body of directors, from the representations made by Mr. Littler. On the contrary, the directors expressly based the prospectus upon his report, and they and the company stood pledged to the position that they held it out to be true. When a board is formed and the public is approached with a prospectus holding out representations and inducements to take shares made by one director, the board stands together in making such representations, and with regard to the actual author of them, his fellow directors and the company back his word. If the case were otherwise, a prospectus might be filled with individual reports from individual directors, all of which would be false, and an action for rescission would fail, because the board as a whole was pledged to none. It would be impossible that financial concerns could be in such circumstances conducted on the principles of fair dealing, and there is no ratio or principle of law which could justify such a course. The representation of one, unless, as I have said, some repudiation of the position be clearly and unambiguously made, is the representation of all. The responsibility attaches to all, and to the company for whom the board and each director acts.

According, therefore, to the principle to be applied to this case, this prospectus is the same as if it contained no quotation marks, but reported as facts emanating from the board what emanated from one of the directors individually.

With much respect to the Court below, I see no ground for the view there taken of treating Mr. Littler as a person standing apart from his fellow directors or the company, nor any ground for the company endeavouring to get rid of those responsibilities which arise in respect of the acts or statements of one of its agents to make representations by the prospectus, and of one of the signatories of that document. I may add that it would be a singular result if a transaction for the taking of shares—a transaction induced by falsehoods or a hoax—could be upheld because the original author of these was not the entire body of directors, but only one of their number.

The representations accordingly being taken to emanate from the company and the whole body of directors or signatories of the prospectus, the case becomes a simple one. In the view which I take of it, it is sufficient in such circumstances that the material representations, or any of them, inducing the contract were untrue, and it is not necessary separately and substantially to establish fraud in such a case. Fraud is averred on the record—and it is difficult to see how, if the averment as to Mr. Littler's report be correct, fraud would not have accompanied the falsehood. For his fellow directors in the prospectus set out that he was "acquainted with the locality from long residence in the Philippines." But with regard to the other directors it might be true that they had themselves been deceived. In law this would not matter, even although it applied to the whole body; for, to use the language of Turner L.J. in the *Reese River Silver Mining Co.* (1), "If it can be shown that a material representation which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the Courts are bound to release him from it, and to take his name off any list of shareholders or contributories

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(1) (1867) L. R. 2 Ch. 604, at p. 609.

H. L. (SC.) on which it may have been put." In an action, in short, for  
 1913 rescission of a contract to take shares, on the ground of mis-  
 MAIR representation in the prospectus, it is not necessary to prove a  
<sup>v.</sup> knowledge by the directors or signatories of that document of its  
 RIO GRANDE untruth. This is in entire accord with a whole body of case law  
 RUBBER on the subject in recent times, and is substantially the language  
 ESTATES, of Lord Lindley in *Karberg's Case*. (1)  
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Then, my Lords, there is this further to be remembered. Fraud is not far away from—nay, indeed, it must be that it accompanies—a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue; for it is contrary to good faith and it partakes of fraud to hold a person to a contract induced by an untruth for which you yourself stand responsible. It is elementary that a party cannot take advantage of a benefit derived from a contract sprung out of his own fraud, and I think it is equally sound that a party cannot take a benefit from a contract sprung out of a falsehood which he has placed before the other party as an inducing cause. And in applying this rule to a case of the inducing misrepresentation being made by one of a body of directors and used by his associates the company as a means of obtaining a contract or raising money, the principle at stake undergoes a legitimate and proper amplification.

But, my Lords, this record on the part of the pursuer alleges that the statements made were not only false but fraudulent. As I have explained, so far as Mr. Littler is concerned, if, as the defenders allege, he was acquainted with the district, and if it were proved that they were, in fact, false, then they must have been fraudulent as well. And the same quality in him would attach to the representation itself as issuing from or through the board. On this head of fraud it must also be remembered that, so far as the accuracy of a statement by one director is concerned, his fellow directors signing the prospectus with him do, as I have already said, back his word. So also does the company. But further, by the very fact of their association, these other directors introduce one of their number and each of their number to the investing public as a person of such reputation

that his word can be relied upon. So far as they are concerned, they intimate and represent that the word they back is not only accurate but honest. And to such an intimation and representation the company itself is also bound.

In this view of the case also (although, as I have explained, I am of opinion that this view does not require to be resorted to) the averments are amply relevant to be admitted to probation. For no one can peruse the prospectus as a whole without seeing that the whole body, and the company, were representing to investors that the good faith as well as the accuracy of Mr. Littler were worthy of trust.

I accordingly agree, my Lords, that the judgments appealed from should be reversed and that a proof of the pursuer's averments should be allowed.

LORD MOULTON. (1) My Lords, I concur. The question in this action appears to me to depend on broad, general principles. The facts of the case, so far as they are relevant, raise the question almost in a typical form. So far as they are necessary for your Lordships' decision they may be stated as follows.

The pursuer applied for shares in the respondent company on the faith of a prospectus issued by the company for the purpose of obtaining subscriptions for shares. In that prospectus there is set out a report by Mr. C. A. Littler, one of the directors of the company, relating to the lands proposed to be acquired by the company for the purpose of the production of rubber. To work a contract for the acquisition of these lands was the main object of the formation of the company, and it was to carry out this contract that the issue of shares was made. The report is highly laudatory of the estates in question, and amongst other things it states that prior to 1895 as much as 40,000 lbs. of rubber per month had paid royalty from those estates. The pursuer alleges in his condescendence that these statements were false and fraudulent, and that he was induced to apply for shares in the company because of these false and fraudulent statements, and that he is entitled to rescission of the contract to take shares.

(1) Read by Lord Parker of Waddington.

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H. L. (SC.)      The defenders allege as a plea in law that the pursuer's averments are irrelevant to support the conclusions of the summons, or, as one would have said in old times in England, they demur to the whole declaration, i.e., allege that it discloses no valid cause of action. This question of relevancy has been tried separately, and the Court of first instance and the First Division of the Court of Session have decided this point of law in favour of the defenders, and the matter is now brought on appeal before this House.

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The contention on behalf of the defenders which has succeeded in the Courts below is that on the true construction of the prospectus the report of Mr. Littler is put forward, not as a statement by the company, but as a statement to the company, the accuracy of which is not vouched for by the company, but is, if I may use the phrase, one of the risks of the adventure in which the members of the public are asked to share. Now, I have no doubt that a prospectus may be couched in such terms that, when fairly construed, the public are warned that the company does not vouch for the accuracy of the reports quoted or referred to therein, and that this may be so even although the report may be made by a person in the employ of the company, or even by a director. It is needless to point out, however, that the more intimately the person from whom the report comes is connected with the company, and in authority therein, the clearer must be the warning to the public that the accuracy of the statements is not vouched by the company.

But the error into which the learned judges in the Courts below appear to me to have fallen is due to their having overlooked the fact that the pursuer alleges the statements in question to be fraudulent as well as false. It is evident that the report was written by the director in question for the purpose of its being inserted in the prospectus. Even if this were not so, it is clear that it was used for such purpose, with his knowledge, consent, and participation. We have, therefore, an allegation of a fraudulent statement made by a director of the company, used by the company for the purpose of obtaining subscriptions, and effective in inducing the pursuer to take the shares. Now, it is elementary law that no person can take advantage of the fraud of

his agent. It would, therefore, be contrary to good conscience that this company should hold the pursuer to a bargain which (for the purposes of this argument) is admitted to have been obtained by the making of a fraudulent statement by a director of the company, which fraudulent statement was used by the company to the knowledge of their director for the purpose of bringing about the contract in question.

I am of opinion, therefore, that the averments of the pursuer are relevant to support the conclusions of the summons, and that this appeal should be allowed. It is not necessary, therefore, for me to examine the prospectus in order to decide whether those averments would have been relevant had there been no allegation of fraud, and I abstain from expressing any opinion upon the point.

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*Interlocutors complained of reversed : Cause remitted to the Court of Session with a declaration that the pursuer is entitled to a proof of his averments : Respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.*

*Lords' Journals, July 18, 1913.*

Agents for appellant: *Barlow, Barlow & Lyde, for St. Clair Swanson & Manson, W.S., Edinburgh.*

Agents for respondents: *Neish, Howell & Haldane, for J. Stuart Macdonald, Solicitor, Edinburgh.*



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Where the grantor of a registered bill of sale framed in conformity with the Bills of Sale Acts is adjudicated a bankrupt before making any default in payment of the sums thereby secured, the goods comprised in the bill of sale are, in the absence of evidence displacing the reputation of ownership, in the possession, order, and disposition of the bankrupt as reputed owner thereof with the consent and permission of the true owner within the meaning of s. 313 of the Irish Bankrupt and Insolvent Act, 1857.

*In re Ginger* [1897] 2 Q. B. 461, and *In re Hayes* [1899] 2 I. R. 206, followed and approved.

*In re Stanley* (1886) 17 L. R. Ir. 487, overruled.

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A building contract provided that the decision of the architect of the building owners on all matters in relation to the work should be final and that payments should be made on the certificate of the architect. The architect, under a misapprehension of his position, allowed his judgment to be influenced by the building owners and improperly delayed issuing his certificates in accordance with their instructions. After the completion of the work and

**BUILDING CONTRACT**—*continued*.

the expiration of the period of maintenance the contractor sued the building owners for the final balance alleged to be due under the contract, but the final certificate was not issued until after the commencement of the action:—

*Held*, that the building owners were precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the certificate was conclusive as to the amount of the claim.

Decision of the Court of Appeal affirmed.  
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2. — **Arbitration Clause**—**Reference to Building Owner's Engineer**—**Disqualification**—**Dispute involving Examination of Engineer**—**Staying Proceedings**—**Arbitration Act, 1889** (52 & 53 *Vict. c. 49*), s. 4.

Where a contractor executes work under a contract containing a provision for the reference of disputes to the engineer of the other party to the contract, and upon the settlement of the final account there arises a bona fide dispute of a substantial character between the contractor and the engineer involving a probable conflict of evidence between them, the fact that the engineer, without any fault of his own, must necessarily be placed in the position of judge and witness is a sufficient reason why the matter should not be referred in accordance with the contract; and the Court will therefore refuse to stay an action by the contractor for payment of the account.

Decision of the Court of Appeal affirmed.

Whether, where the action embraces several items, all within the reference clause, as to some of which the arbitrator is disqualified from acting, the Court should allow the action to proceed as to these items and allow the remaining items to be referred, *quære*.

*Per* Lord Parker of Waddington: It is the practice of the Chancery Division to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference, and in many cases that is a desirable course. **BRISTOL CORPORATION v. JOHN AIRD & Co.** - - - **H. L. (E.) 241**

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[1913] **A. C. 191**
- *Mair v. Rio Grande Rubber Estates, Ltd.*  
1913 S. C. 183.  
Reversed - - - [1913] **A. C. 610**
- *Mason v. Provident Clothing and Supply Co., Ltd.* [1913] 1 K. B. 65.  
Reversed - - - [1913] **A. C. 727**
- *Metropolitan Water Board v. Phillips*  
[1912] 2 Ch. 546.  
Reversed and decision of *Parker J.*  
[1912] 1 Ch. 296 restored  
[1913] **A. C. 86**
- *Minturn v. Barry* - [1912] 3 K. B. 510  
Order of the Court of Appeal, so far  
as it ordered a new trial, reversed *sub*  
*nom.* *BARRY v. MINTURN*  
[1913] **A. C. 584**  
  
Dictum of *Banks J.* in *MINTURN v.*  
*BARRY* [1911] 2 K. B. 265, overruled.  
*BARRY v. MINTURN* [1913] **A. C. 584**
- *National Telephone Co., Ltd. v. His Majesty's Postmaster-General* [1913] 2 K. B. 614.  
Affirmed - - - [1913] **A. C. 546**
- *New Monckton Collieries, Ltd. v. Keeling*  
[1911] A. C. 648.  
Distinguished. *POTTS OR YOUNG v.*  
*NIDDRIE AND BENHAR COAL COM-*  
*PANY, LIMITED* - [1913] **A. C. 531**
- *Norfolk and North American Steam Ship-*  
*ping Co., Ltd. v. Virginia Carolina*  
*Chemical Co.* [1912] 1 K. B. 229.  
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- *Payne v. N. Fortescue & Sons, Ltd.* [1912] 3  
K. B. 346.  
Considered. *SUMMERLEE IRON COM-*  
*PANY v. FREELAND* - [1913] **A. C. 221**
- *Potts or Young v. Niddrie and Benhar*  
*Coal Co., Ltd.*, 1912 S. C. 644.  
Reversed - - - [1913] **A. C. 531**
- *Rex v. St. Luke's Hospital* (1760) 2 Burr.  
1053, at p. 1064.  
Dictum of *Lord Mansfield* in, con-  
sidered. *LIVERPOOL CORPORATION v.*  
*CHORLEY UNION ASSESSMENT COM-*  
*MITTEE AND WITHNELL OVERSEERS*  
[1913] **A. C. 197**
- *Rylands v. Fletcher* (1868) L. R. 3 H. L.  
330.  
Distinguished. *RICKARDS v. LOTHIAN*  
[1913] **A. C. 263**
- *Schulze v. Tod* - - - 1912 S. C. 50  
Affirmed - - - [1913] **A. C. 213**
- *Scott v. Scott* - - - [1912] P. 241  
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- *Smurthwaite v. Hannay* - [1894] A. C. 494  
Dictum of *Lord Russell of Killowen* in,  
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*TYZACK AND BRANFOOT STEAMSHIP*  
*COMPANY, LIMITED* - [1913] **A. C. 680**
  - *Solomon v. Attenborough* - [1912] 1 Ch. 451  
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  - *Spence v. Union Marine Insurance Co.*  
(1868) L. R. 3 C. P. 427.  
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*TYZACK AND BRANFOOT STEAMSHIP*  
*COMPANY, LIMITED* [1913] **A. C. 680**
  - *Stanley, In re* - (1886) 17 L. R. Ir. 487  
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*H. EGAN, LIMITED* - [1913] **A. C. 564**
  - *Summerlee Iron Co., Ltd. v. Freeland,*  
1912 S. C. 1145.  
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  - *Swansea Corporation v. Harpur* [1912] 3  
K. B. 493.  
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*CORPORATION* - [1913] **A. C. 597**
  - *Swansea Improvements and Tramway Co.*  
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[1892] 1 Q. B. 357.  
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*ELECTRIC TRAMWAYS, LIMITED*  
[1913] **A. C. 702**
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[1902] A. C. 56.  
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*Metropolitan Electric Tramways, Ltd.*  
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  - *Truman, Hanbury, Buxton & Co. v. Inland*  
*Revenue Commissioners* [1912] 3 K. B.  
377.  
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*REVENUE COMMISSIONERS v. TRUMAN,*  
*HANBURY, BUXTON & CO.*  
[1913] **A. C. 650**
  - *Tyzack and Branfoot Steamship Co., Ltd. v.*  
*Sandeman & Sons*, 1913 S. C. 19.  
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*v. TYZACK AND BRANFOOT STEAMSHIP*  
*COMPANY, LIMITED* - [1913] **A. C. 680**
  - *Vacher & Sons, Ltd. v. London Society of*  
*Compositors* [1912] 3 K. B. 547.  
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**CHattel MORTGAGES**—Damages for negligent sales of horses—Appeal from Canada - - - 299  
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**CIVIL SERVICE**—Rights of officer in the Civil Service on superannuation—Appeal from New South Wales - - 172  
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**COLUMBIA (BRITISH)**—Laws of—Canada.  
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**COMMISSION**—Agreement to give an option to purchase and also a commission on sale—Construction—Appeal from Manitoba - - - 191  
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**COMMIXTIO**—Ship—Affreightment—Bill of lading—Liability for unmarked goods  
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**COMPANY**—Contract to take Shares—Rescission—Fraudulent Misrepresentation—Prospectus—Quotation in Prospectus of Report by one of the Directors—Responsibility of Company for Truth of Statements in Report.

A company formed for the purpose of acquiring a rubber estate issued a prospectus which quoted a report made before the incorporation of the company by one of the directors who was stated to be acquainted with the locality. The prospectus also stated that no portion of the price of the estate would be paid until the company had received an independent report confirming the statements of the director. The report stated that the estate contained wild rubber trees in such quantities that immediate profits were assured.

In an action brought by a shareholder against the company for rescission of his contract to take shares the pursuer averred by his condescendence that he had applied for the shares in reliance upon the statements in the prospectus and the report, and that he had since learned that those statements were false and fraudulent, and in particular that there was no rubber on the estate. The company pleaded that these averments were irrelevant to support the conclusions of the summons:—

*Held*, that the company was responsible, at all events, for the absence of fraud in the representations made by its agent, and that the pursuer was therefore entitled to a proof of his averments.

*Per Lord Shaw of Dunfermline*: Prima facie, a company which issues a prospectus embodying a report made by a director is responsible for the truth of, as well as for the absence of fraud in, the statements of fact contained in the report.

Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland, 1913 S. C. 183, reversed. *MAIR v. RIO GRANDE RUBBER ESTATES, LIMITED.*

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— Insurance company.  
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**COMPANY**—continued.

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— Suit by assignees from receivers of a company not in liquidation—Contracts by the debtors with the company—Right to set-off in respect of damages for breach—Appeal from Ontario - 160  
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**COMPENSATION**—Waterworks—Breaking up streets—Cost of repair—Jurisdiction of justices - - - 597  
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**CONTEMPT OF COURT**—Committal—Appeal—Competency—Criminal cause or matter - - - 417  
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**CONTRACT**—Building contracts.  
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**CONTRACTING OUT**—Workmen's compensation—Scheme of compensation—Re-certification—Ballot—Jurisdiction of county court judge - - - 638  
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**CORPORATION**—By-laws—Validity of municipal by-laws—Validity of municipal debentures—Limitation—Appeal from British Columbia - - - 181  
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**COST**—Waterworks—Breaking up streets—Jurisdiction of justices - - 597  
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**COUNTY COURT**—Workmen's compensation.  
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**CRIMINAL LAW**—Contempt of Court—Committal — Appeal — Competency — Criminal cause or matter - - - 417  
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**DAMAGE AND DAMAGES**—Building contract — Construction — Liquidated damages — See SCOTTISH LAW. 2. 143

— Chattel mortgages—Damages for negligent sales of horses—Appeal from Canada — See PRIVY COUNCIL APPEALS. 3. 299

— Fatal accident — Evidence — Prospective loss - - - - - 1  
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— Ship—Fire—Damage to cargo—Unseaworthiness—Bill of lading—Exceptions — See SHIPPING. 2. 52

**DAMPNESS** — London building—Party structure — Defective party wall—Making good or repairing - - - - - 584  
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**DEBENTURES**—Validity of municipal debentures—Appeal from British Columbia — See PRIVY COUNCIL APPEALS. 7. 181

**DEFAMATION** — Libel—Innuendo—Newspaper — Trade Publication—List of Decrees in Absence — Erroneous Entry—Imputation of Insolvency.

In an action for libel brought by a tradesman in Scotland against the proprietors of a trade journal known as *Stubbs' Weekly Gazette*, the defenders admitted that in a certain issue of their journal the pursuer's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the small debts courts, the fact being that the debt had been paid and the action dismissed. This list was headed by a note explaining that in no case did the publication of the decree imply inability to pay on the part of any one named. The pursuer averred that the entry falsely and calumniously represented that he was unable to pay his debts, and the Court approved an issue for the trial embodying this innuendo:—

*Held*, that the entry, when read in connection with the explanatory note, was incapable of bearing the defamatory meaning ascribed to it, and consequently that there was no question to go to the jury, and the issue ought to have been disallowed.

*Crabbe & Robertson v. Stubbs, Ltd.* (1895) 22 R. 860, and *Hunter & Co. v. Stubbs, Ltd.* (1903) 5 F. 920, considered.

Interlocutor of the Second Division of the Court of Session in Scotland, reversed. *STUBBS, LIMITED v. RUSSELL* - - - **H. L. (Sc.) 386**

**DELAY**—Building contract—Arbitration clause — Architect — Disqualification — Collusion—Improper delay in issuing certificate - - - - - 229  
See BUILDING CONTRACT. 1.

**DEPENDANTS**—Workmen's compensation.  
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**DESERTION**—Workmen's compensation—Dependants—Desertion by father—Decree for aliment - - - - - 531  
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**DIRECTORS**—Company.  
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**DISQUALIFICATION**—Building contract—Arbitration clause—Architect—Collusion—Improper delay in issuing certificate — See BUILDING CONTRACT. 1. 229

— Building contract—Arbitration clause—Engineer—Dispute involving examination of engineer—Staying proceedings — See BUILDING CONTRACT. 2. 241

— Parliament—Contract with the Secretary of State for India in Council—Contract for the public service - - - - - 514  
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**DIVORCE**—Practice — Nullity — Hearing in Camera—Publication of Proceedings after Decree — Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 2, 6, 22, 46—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.

The Probate, Divorce and Admiralty Division has no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

*Barnett v. Barnett* (1859) 29 L. J. (P. & M.) 28, and *H. (falsely called C.) v. C.* (1859) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605, followed and approved.

*A. v. A.* (1875) L. R. 3 P. & M. 230, overruled.

*D. v. D.* [1903] P. 144, considered.

*Per* Viscount Haldane L.C.: The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings in exceptional cases.

*Per* Earl Loreburn: In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause

**DIVORCE—continued.**

and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript in contravention of the order directing that the cause should be heard in camera, BARGRAVE DEANE J. held that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay the costs of the motion, and an appeal from this order was dismissed as incompetent :—

*Held*, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed. SCOTT v. SCOTT - **H. L. (E.) 41**

**DUTY—Inland Revenue.**

See under REVENUE.

**EDINBURGH** — Burgh — Drainage and road authority—Flooding—Natural stream — RepARATION—Negligence - - - **488**  
See SCOTTISH LAW. 3.

— Loan—Burgh—Issue of redeemable stock by municipal corporation—"Redeemable" - - - - - **133**  
See SCOTTISH LAW. 4.

**EDINBURGH CORPORATION STOCK ACT, 1894** - - - - - **133**  
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**EDINBURGH IMPROVEMENT AND TRAMWAYS ACT, 1896** - - - - - **133**  
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**EDUCATION.**

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**EMPLOYER AND WORKMAN—Compensation — Arbitration — Competency — Question arising as to Duration of Compensation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3.**

The employers of a workman, who had been totally incapacitated by an accident, admitted liability under the Workmen's Compensation Act, 1906, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause: "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application is made for payment." The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, such as he could embody in a memorandum of agreement for the

**EMPLOYER AND WORKMAN—continued.**

purpose of recording, and he refused to sign the receipt and initiated arbitration proceedings :—

*Held*, that a question had arisen between the parties as to the duration of compensation, and that the arbitration was competent.

*Payne v. N. Fortescue & Sons, Ltd.* [1912] 3 K. B. 346, and *Gourlay Brothers & Co. (Dundee), Ltd. v. Sweeney* (1906) 8 F. 965, considered.

Interlocutor of the Second Division of the Court of Session in Scotland, 1912 S. C. 1145, affirmed. SUMMERLEE IRON COMPANY, LIMITED v. FREELAND - - **H. L. (Sc.) 221**

**2. — Compensation — Contracting out — Scheme of Compensation — Re-certification — Ballot—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3, sub-s. 1; s. 15, sub-ss. 2 and 3.**

A scheme of compensation under the Workmen's Compensation Act, 1906, is not bad because it purports to oust the jurisdiction of the arbitrator under the Act, and a workman who has agreed to accept the provisions of a duly certified scheme cannot resort to any of the provisions of the Act.

*Horn v. Lords Commissioners of the Admiralty* [1911] 1 K. B. 24, followed.

On re-certification under s. 15 of the Workmen's Compensation Act, 1906, of a scheme of compensation which has been certified under the Workmen's Compensation Act, 1897, it is not necessary that a ballot of the workmen shall be taken before the registrar can re-certify.

Decision of the Court of Appeal [1912] 2 K. B. 26, affirmed. GODWIN v. LORDS COMMISSIONERS OF THE ADMIRALTY

**H. L. (E.) 638**

**3. — Compensation — Dependents — Desertion by Father—Decree for Alimony—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.**

In March, 1907, a workman deserted his wife and children. Up to 1909 he occasionally made small payments to his wife and two younger children, amounting in all to 2*l.*, which was applied towards the support of the family. The payments then ceased, and in September, 1909, the wife obtained a decree against him for alimony of the two younger children who were in pupillarity and recovered 17*s.* from his employers by arrestment used on the decree. The workman then disappeared to avoid further diligence and was not traced until his death in April, 1911, by accident arising out of and in the course of his employment. The wages due to him on his death were paid to his wife. From the date of his desertion the wife and family were supported almost entirely from the earnings of the two elder children. These contributions were not made ex pietate and could have been recovered under the decree for alimony. The widow claimed compensation under the Workmen's Compensation Act, 1906, on behalf of her two pupil children :—

*Held*, that there was evidence upon which the arbitrator could find that these children were wholly dependent on the earnings of their father.

**EMPLOYER AND WORKMAN—continued.**

Interlocutor of the Second Division of the Court of Session in Scotland, 1912 S. C. 644, reversed.

*New Monkton Collieries, Ltd. v. Keeling* [1911] A. C. 648, distinguished. *POTTS OR YOUNG v. NIDDRIE AND BENHAR COAL COMPANY, LIMITED* - - - **H. L. (Sc.) 531**

4. — *Compensation — Workman — Fisherman—Share of Profits—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 7, sub-s. 2.

A claimant under the Workmen's Compensation Act, 1906, was employed as boatswain on a steam fishing trawler and was remunerated by wages, maintenance, and poundage dependent on the profits of the fishing expedition :-

*Held* by Earl of Halsbury, Lord Mersey, and Lord Parker of Waddington (Earl Loreburn and Lord Atkinson dissenting), that he was remunerated by a share in the profits within the meaning of s. 7, sub-s. 2, of the Act, and was therefore excluded from the Act and not entitled to compensation.

Decision of the Court of Appeal affirmed. *COSTELLO v. OWNERS OF SHIP "PIGEON"*

**H. L. (E.) 407**

**ENGINEER**—Building contract—Arbitration clause—Reference to building owner's engineer—Disqualification—Dispute involving examination of engineer—Staying proceedings - - - **241**  
*See BUILDING CONTRACT. 2.*

**ESTOPPEL**—Bank—Crossed cheque—Payment—Exchange of cheques—Ostensible authority—Appeal from Straits Settlements (Settlement of Singapore) - **847**  
*See PRIVY COUNCIL APPEALS. 19.*

**EVIDENCE**—Fatal accident—Damage—Prospective loss - - - **1**  
*See FATAL ACCIDENT.*

**EXECUTION**—Fieri facias—Unpatented mining claim in Ontario—Seizure and sale **828**  
*See PRIVY COUNCIL APPEALS. 9.*

— Ontario Execution Act, 1909—Ontario Crown Timber Act, 1897 - - **145**  
*See PRIVY COUNCIL APPEALS. 10.*

**EXECUTOR**—Power to pledge Personal Chattels—Pledge by one of two Executors and Trustees—Validity—Payment of Debts—Passing of Residuary Account—Lapse of Time—Assent to Trusts of Will.

A testator by his will, after appointing two persons executors and trustees and giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. Fourteen years after the testator's death one of the executors, without the knowledge of his co-executor, pledged certain plate forming part of the testator's residuary estate with a firm of pawnbrokers, who had no notice that he was not the absolute owner thereof, and misapplied the money so raised. All the debts and legacies, so far as was known, were paid, and the residuary account was passed,

**EXECUTOR—continued.**

within one year of the testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor, the transaction was discovered and an action was brought by the co-executor and a new trustee against the pawnbrokers to recover the plate :-

*Held*, that the proper inference to be drawn from the facts was that at the date of the pledge the executors had assented to the trust dispositions taking effect and held the plate not as executors but as trustees; that, therefore, the deceased executor had no power to pledge the plate and the existing trustees were entitled to recover it.

Decision of the Court of Appeal [1912] 1 Ch. 451, affirmed. *GEORGE ATTENBOROUGH & SON v. SOLOMON* - - - **H. L. (E.) 76**

**FATAL ACCIDENT**—Damage—Evidence—Prospective Loss—*Fatal Accidents Act, 1846* (9 & 10 Vict. c. 93), ss. 1 and 2.

It is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, 1846, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life.

Dicta of Dowse B. in *Bourke v. Cork and Macroom Ry. Co.* (1879) 4 L. R. Ir. 682, and of Lord Morris, when Chief Justice, in *Holleran v. Bagnell* (1880) 6 L. R. Ir. 333, overruled.

Where, therefore, an action was brought by a father under the Fatal Accidents Act, 1846, for damages for the loss of a daughter, aged sixteen, who was killed by the negligence of the defendants, and it was proved that at the date of her death the deceased, who lived with her parents, was nearing the completion of her apprenticeship as a dressmaker and was likely in the near future to earn a remuneration which might quickly have become substantial :-

*Held*, that there was evidence of damage upon which the jury could reasonably act. *TAFF VALE RAILWAY COMPANY v. JENKINS*

**H. L. (E.) 1**

**FIERI FACIAS**—Execution—Unpatented mining claim in Ontario—Seizure and sale—Appeal from Ontario - - **828**  
*See PRIVY COUNCIL APPEALS. 9.*

**FINANCE ACTS.**

*See under REVENUE.*

**FIRE**—Ship—Damage to cargo—Unseaworthiness—Bill of lading—Exceptions *See SHIPPING. 2.* - **52**

**FIRE INSURANCE.**

*See under INSURANCE (FIRE).*

**FISHERMAN**—Workmen's compensation—Workman—Share of profits - - **407**  
*See EMPLOYER AND WORKMAN. 4.*

**FLOODING**—Burgh—Drainage and road authority—Natural stream—Reparation—Negligence—Edinburgh Corporation *See SCOTTISH LAW. 3.* **481**



- FOREIGN INVESTMENTS**—Income tax—Insurance company—Interest not remitted home - - - - 610  
See REVENUE. 2.
- FORFEITURE**—Relief against—Default in payment of an instalment of purchase-money—Time of the essence of the contract—Specific performance decreed—Appeal from British Columbia - 319  
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- FRAUD**—*Contract induced by Fraudulent Misrepresentation.*  
Interlocutor of the Second Division of the Court of Session in Scotland (1911, S. C. 33) reversed on the facts. GLASGOW AND SOUTH WESTERN RAILWAY COMPANY v. BOYD & FORREST - - - - H. L. (Sc.) 404
- Knowledge of unregistered rights—Rectification—Trustee—Registration of Titles Regulation, 1891—Laws of Malay States - - - - 491  
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- FRAUDULENT MISREPRESENTATION**—Company—Contract to take shares—Rescission—Quotation in prospectus of report by one of the directors - 853  
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- HIGHWAY**—Land tax—Redemption—Exoneration—Land abutting on highway—Presumption that soil of highway passes ad medium filum - - - - 364  
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- INITIAL LETTERS**—Trade mark—Registration—Distinctive mark—User - - - 624  
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- INNUENDO**—Libel—Newspaper—Trade publication—List of decrees in absence—Erroneous entry—Imputation of insolvency - - - - 386  
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- INSTALMENT**—Forfeiture, Relief against—Default in payment of an instalment of purchase-money—Time of the essence of the contract—Specific performance decreed—Appeal from British Columbia  
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- INSURANCE COMPANY**—Income tax—Foreign investments—Interest not remitted home - - - - 610  
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- INSURANCE (FIRE)**—Condition in policy—Declaration of other insurances—Substitution of insurances for those declared—Appeal from the Ottoman Dominions  
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- INTEREST**—Income tax—Foreign investments—Insurance company—Interest not remitted home - - - - 610  
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- Rate of—Trustees, Liability of—Breach of trust—Mora—Contributory negligence  
See SCOTTISH LAW. 5. 213
- INVESTMENTS**—Foreign investments—Income tax—Insurance company—Interest not remitted home - - - - 610  
See REVENUE. 2.
- IRISH LAW**—Bankruptcy—Reputed ownership—Bill of sale—Irish Bankrupt and Insolvent Act, 1857 - - - 564  
See BANKRUPTCY.
- JUDICATURE ACT, 1873**—Appeal—Competency—Criminal cause or matter—Contempt of Court—Committal - - - 417  
See DIVORCE.
- JURISDICTION**—Justices—Waterworks—Breaking up streets—Cost of repair—Compensation - - - - 597  
See WATER. 1.
- Workmen's compensation—County court judge - - - - 638  
See EMPLOYER AND WORKMAN. 2.
- JUSTICES**—Waterworks—Jurisdiction—Breaking up streets—Cost of repair - 597  
See WATER. 1.
- LAND**—Native titles to land—New Zealand Settlement Act, 1863—Order in Council - - - - 761  
See PRIVY COUNCIL APPEALS. 16.
- LAND TAX**—*Redemption—Exoneration—Land abutting on Highway—Presumption that Soil of Highway passes ad medium filum—Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 4, 17, 18, 80—Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 8, 38.*  
Where the land tax upon land adjoining a public highway has been redeemed, the presumption that the soil of the highway ad medium filum belongs to the owner of the adjoining land applies so as to extend the exoneration from tax to the middle of the highway.  
A railway was constructed, under statutory powers, in the city of London, partly beneath a highway adjoining lands in respect of which the land tax had been previously redeemed :—  
*Held*, that the portion of the railway under



**LAND TAX**—*continued.*

the moiety of the highway adjoining the ex-  
operated lands was not liable to land tax.

Order of the Court of Appeal [1911] 2 Ch.  
467, affirmed. **CITY OF LONDON LAND TAX  
COMMISSIONERS v. CENTRAL LONDON RAILWAY  
COMPANY** - - - - **H. L. (E.) 364**

**LAND VALUES** Revenue.

*See under* **REVENUE.**

**LAVATORY**—Action for negligence—Proximate  
cause of damage—Malicious act of  
third person—Reasonable precautions—  
Overflow of water from lavatory in  
upper floor—Appeal from Australia **263**  
*See* **PRIVY COUNCIL APPEALS. 1.**

**LETTERS**—Trade mark—Initial letters—Regis-  
tration—Distinctive mark—User - **624**  
*See* **TRADE MARK.**

**LEVEL CROSSINGS**—Duty to sound whistle—  
Duty to warn persons—Canadian  
railways - - - - **838**  
*See* **PRIVY COUNCIL APPEALS. 12.**

**LIBEL.**

*See under* **DEFAMATION.**

**LICENCE**—Licensing Acts.

*See under* **LICENSING ACTS.**

**LICENSING ACTS**—Revenue—Licensed premises  
—Annual licence value—Basis of  
calculation - - - - **650**  
*See* **REVENUE. 3.**

**LIQUIDATED DAMAGES**—Building contract—  
Construction - - - - **143**  
*See* **SCOTTISH LAW. 2.**

**LOAN**—Local government—Burgh—Issue of  
redeemable stock by municipal corpora-  
tion—"Redeemable" - - - **133**  
*See* **SCOTTISH LAW. 4.**

**LOCAL GOVERNMENT**—Loan—Burgh—Issue  
of redeemable stock by municipal  
corporation—"Redeemable" - **133**  
*See* **SCOTTISH LAW. 4.**

**LONDON**—Building—Party Structure—Defec-  
tive Party Wall—Making good or repairing—  
Dampness—*London Building Act, 1894* (57 & 58  
*Vict. c. ccviii.*), ss. 88, 90, 91.

The tribunal adjudicating under the London  
Building Act, 1894, upon a dispute between a  
building owner and an adjoining owner as to the  
mode of repairing a defective party wall is not  
entitled to take into consideration the previous  
history of the wall.

Dictum of Bankes J. in *Minturn v. Barry*  
[1911] 2 K. B. 265, overruled.

The right conferred by the Act upon the  
building owner to make good a party structure  
which is defective or out of repair is confined to  
making good the party structure so that it  
becomes effective for the purposes for which it  
is actually used or intended to be used, and in  
determining the proper way of making good the

**LONDON**—*continued.*

defect the tribunal is to have due regard to the  
convenience of the adjoining owner.

Dampness in a wall is not a defect within the  
meaning of the Act unless it renders the wall less  
effective for the purposes for which it is used or  
intended to be used; it is not a defect in a wall  
between two gardens.

A wall which divided the gardens of two  
adjoining houses in London was utilized for the  
retaining wall of an extension made to one of  
the houses. The owner of the extended house  
complained that the dampness of the party wall  
affected the basement of her extension and  
proposed as building owner under the London  
Building Act, 1894, to enter upon the premises  
of the adjoining owner and make good the party  
wall on his side. A difference having arisen  
under the Act, the county court judge, upon an  
appeal from an award of the statutory tribunal,  
found that the party wall was defective in that  
it allowed damp to percolate into the building  
owner's basement, but that effective work for  
preventing the damp could be done on her side  
of the wall, and held, having regard to the  
previous history and user of the wall, that no  
work should be permitted on the adjoining  
owner's side; and he directed that the building  
owner should be at liberty from her side of the  
wall to insert a vertical damp course in the  
middle of the wall;—

*Held*, that the judge had misdirected himself  
in holding that he could have regard to the  
previous history of the wall, but that the remedy  
proposed by him was a making good of the wall  
within the meaning of the Act, and that in the  
circumstances the misdirection was not a ground  
for ordering a new trial.

Order of the Court of Appeal, so far as it  
ordered a new trial [1912] 3 K. B. 510, reversed.  
**BARRY v. MINTURN** - - - **H. L. (E.) 584**

— **Water.**

*See under* **WATER.**

**MALAY STATES**—Laws of - - - **491**  
*See* **PRIVY COUNCIL APPEALS. 13.**

**MANAGEMENT**—Non-provided school—Duty to  
maintain and keep efficient—Powers of  
management - - - - **54**  
*See* **SCHOOL.**

**MANITOBA**—Laws of—Canada - - **191**  
*See* **PRIVY COUNCIL APPEALS. 8.**

**MASTER AND SERVANT.**

*See under* **EMPLOYER AND WORKMAN.**

**MATRIMONIAL CAUSES ACTS.**

*See under* **DIVORCE.**

**MERCHANT SHIPPING.**

*See* **SHIPPING.**

**METROPOLITAN WATER BOARD (CHARGES)**  
**ACT, 1907** - - - - **86**  
*See* **WATER. 2.**

**MINE**—Execution—Fieri facias—Unpatented  
mining claim in Ontario—Seizure and  
sale—Appeal from Ontario - - **828**  
*See* **PRIVY COUNCIL APPEALS. 9.**

**MINE**—*continued.*

— Minerals—Support—Railway—Mines lying outside the forty yards limit - 11  
*See RAILWAY.*

**MINERALS.**

*See MINE.*

**MISREPRESENTATION**—Fraud—Contract induced by fraudulent misrepresentation  
*See FRAUD.* 404

— Fraudulent company—Contract to take shares—Rescission—Quotation in prospectus of report by one of the directors  
*See COMPANY.* 853

**MORA**—Trustees, Liability of—Breach of trust—Contributory negligence—Right of pursuers to represent beneficiaries—Rate of interest - - - 213  
*See SCOTTISH LAW.* 5.

**MORTGAGE**—Chattel mortgages—Damages for negligent sales of horses—Appeal from Canada - - - 299  
*See PRIVY COUNCIL APPEALS.* 3.

**MUNICIPAL CORPORATION.**

*See CORPORATION.*

**NEGLIGENCE**—Action for—Proximate cause of damage—Malicious act of third person—Reasonable precautions—Overflow of water from lavatory in upper floor—Appeal from Australia - - 263  
*See PRIVY COUNCIL APPEALS.* 1.

— Agent and client—Breach of duty—Solicitor and bank agent - - - 529  
*See SCOTTISH LAW.* 1.

— Burgh—Drainage and road authority—Flooding—Natural stream—Reparation—Edinburgh Corporation - - 488  
*See SCOTTISH LAW.* 3.

— Contributory negligence—Trustees—Breach of trust—Mora—Rate of interest  
*See SCOTTISH LAW.* 5. 21

— Damages for negligent sales of horses—Chattel mortgages—Appeal from Canada - - - 299  
*See PRIVY COUNCIL APPEALS.* 3.

**NEW SOUTH WALES**—Laws of.

*See PRIVY COUNCIL APPEALS.* 14, 15.

**NEWSPAPER**—Libel—Innuendo—Trade publication—List of decrees in absence—Erroneous entry—Imputation of insolvency - - - 386  
*See DEFAMATION.*

**NEW ZEALAND**—Laws of.

*See PRIVY COUNCIL APPEALS.* 16, 17.

**NORTH-WEST PROVINCES**—Laws of—Canada  
*See PRIVY COUNCIL APPEALS.* 3. 299

**NORTH-WEST PROVINCES CONSOLIDATED ORDINANCES, 1898** - - - 299  
*See PRIVY COUNCIL APPEALS.* 3.

**NULLITY**—Divorce.

*See under DIVORCE.*

**ONTARIO**—Laws of—Canada.

*See PRIVY COUNCIL APPEALS.* 9—11.

**OPTION**—Agreement to give an option to purchase and also a commission on sale—Construction—Appeal from Manitoba  
*See PRIVY COUNCIL APPEALS.* 8. 191

**OTTOMAN DOMINIONS**—Laws of.

*See PRIVY COUNCIL APPEALS.* 18.

**PARLIAMENT**—*Disqualification—Contract with the Secretary of State for India in Council—Contract for the Public Service*—22 Geo. 3, c. 45—41 Geo. 3, c. 52—22 & 23 Vict. c. 106.

A member of a firm holding a contract with the Secretary of State for India in Council is, under 22 Geo. 3, c. 45, and 41 Geo. 3, c. 52, disabled from sitting and voting in the House of Commons. *In re SAMUEL* - - - P. C. 514

**PARTY WALL**—London building—Party structure—Defective party wall—Making good or repairing - - 584  
*See LONDON.*

**PLEDGE**—Executor—Power to pledge personal chattels—Pledge by one of two executors and trustees—Validity - - 76  
*See EXECUTOR.*

**POLICY**—Fire insurance.

*See under INSURANCE (FIRE).*

**POOR RATE.**

*See under RATES.*

**POWER OF APPOINTMENT**—Aggregation of estates—New South Wales Stamp Duties (Amendment) Act, 1904, s. 21  
*See PRIVY COUNCIL APPEALS.* 15. 747

**PRESUMPTION**—Land tax—Redemption—Exoneration—Land abutting on highway—Presumption that soil of highway passes ad medium filum - - 364  
*See LAND TAX.*

**PRIVY COUNCIL APPEALS—AUSTRALIA**—*Negligence, Action for—Proximate Cause of Damage—Malicious Act of Third Person—Reasonable Precautions—Overflow of Water from Lavatory in Upper Floor.*

To sustain an action for negligence it must be shewn that the negligence found by the jury is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.

In an action for damages to property located on the second floor of a building leased to the

**PRIVY COUNCIL APPEALS—continued.**

defendant, through a continuous overflow of water from a lavatory basin on the top floor caused by the water tap having been turned on full and the waste pipe plugged, the jury found that "this was the malicious act of some person":—

*Held*, (1.) that the defendant was not responsible unless either he instigated the act or the jury had found that he ought reasonably to have prevented it; (2.) that his having on his premises a proper and reasonable supply of water was an ordinary and proper user of his house, and that although he was bound to exercise all reasonable care he was not responsible for damage not due to his own default, whether caused by inevitable accident or the wrongful acts of third persons.

*Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, distinguished. **RICKARDS v. LOTHIAN P. C. 263**

— Australia—New South Wales—Laws of.

*See* Nos. 14, 15, below.

**2. — AUSTRALIA—Restraint of Trade—**

*Australian Industries Preservation Act, 1906 (Australian Commonwealth Acts, No. 9 of 1906), ss. 4, 7, 10, 15A—Contract or Combination in Restraint of Trade—Monopoly—Intent to the Detriment of the Public—Construction—Evidence to establish Offence.*

A contract in restraint of trade which is unenforceable at common law, or a combination in restraint of trade which, if embodied in a contract, would be unenforceable at common law, are neither of them necessarily "to the detriment of the public" within the meaning of the Australian Industries Preservation Act, 1906, ss. 4 and 7, and a party to a contract or combination of that character cannot, merely because he is a party thereto, be taken to have intended this detriment. In a prosecution under either of those sections the wrongful intent must be proved by proper evidence. For this purpose the prosecutor may tender proof that the evils against which the Act is directed were the natural and necessary consequence of the contract or combination, monopoly or attempt to monopolize, and that those evils have in fact ensued. He cannot plead the evidence upon which he hopes to establish wrongful intention and rely on s. 15A of the Act as rendering proof of what he pleads unnecessary.

The principles of the law as to monopolies and contracts in restraint of trade prior to the passing of the above Act considered. **ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA v. ADELAIDE STEAMSHIP COMPANY, LIMITED - - - P. C. 781**

— **BRITISH COLUMBIA—Laws of.**

*See* Nos. 5—7, below.

**3. — CANADA — Chattel Mortgages —**

*Damages for Negligent Sales of Horses—North-West Provinces Consolidated Ordinances, 1898, c. 34, ss. 2, 3, and Schedule—Construction—Restriction upon Charges by Mortgagees—Penalty for Excess Charges permissive—Bank Act, 1906, s. 91—Stipulated Rate inoperative—*

**PRIVY COUNCIL APPEALS—continued.**

*Voluntary Payments at Unauthorized Rate irrecoverable.*

In suits by mortgagors for an account of what was due by them under chattel mortgages credit was claimed in respect of damages for the mortgagees' negligence in the realization of certain horses seized and sold by them, and also for a penalty being treble the amount of an alleged excess charge by the bank for expenses and commission on the sales thereof. The stipulated rate of interest was 8 per cent. per annum, the mortgagees admitted that they could not enforce a higher rate than 7 per cent., while the mortgagors contended that only 5 per cent. could be recovered:—

*Held*, that (1.) the findings of the trial judge as to the defendant's negligence in the sales and as to the consequent quantum of damages were not shewn to have been erroneous and therefore should not have been varied in appeal.

(2.) The limitation by North-West Provinces Consolidated Ordinances, 1898, c. 34, of a chattel mortgagee's charges in respect of seizures and sales related only to certain indispensable acts specified in the schedule thereto. The parties to the mortgage were left free to contract with reference to any other expenses of realization which might be shewn to be reasonable and necessary; and no ground had been shewn for imposing the penalty, which was permissive and not imperative, since the defendant's conduct had been reasonable and prudent.

(3.) Under Bank Act, 1906, s. 91, the stipulation for 8 per cent. interest was inoperative, and therefore, as no rate had been fixed by agreement, only the legal rate of 5 per cent. was recoverable. As regards past payments of interest at a rate not authorized by the Act the mortgagors were not entitled to recover back the excess which they had voluntarily paid. **MCHUGH v. UNION BANK OF CANADA**

**P. C. 299**

**4. — CANADA — ALBERTA — Powers of Provincial Legislature—Alberta Act, 1 Geo. 5, c. 9, held ultra vires—Civil Rights existing and enforceable outside the Province.**

The appellant bank received on deposit at its branch in New York the proceeds in London of a mortgage bond issue by the Alberta Railway Company guaranteed by the Government of Alberta. Under instructions from its head office in Montreal a special railway account in respect thereof in the name of the Treasurer of the province was opened at its Alberta branch (no money being sent there in specie and the account remaining under the control of the said head office) for purposes connected with railway construction wholly within the province as provided by Alberta Acts 16 and 49 of 1909 and subsequent Orders in Council and contracts.

Albert Act 1 Geo. 5, c. 9, recited that the railway had defaulted in payment of the interest on the bonds and in construction of the line, ratified the guarantee of the bonds, and enacted that the whole of the proceeds of the bonds, including the amount deposited with the appellant bank, should form part of the general revenue fund of the province, free from all claim



**PRIVY COUNCIL APPEALS** —*continued.*

of the railway company or their assigns, and should be paid over to the Treasurer of the province.

In an action by the Crown and Provincial Treasurer to recover the amount of the deposit held by the appellant bank the latter pleaded that this Act was ultra vires:—

*Held*, that the bondholders having subscribed their money for a purpose which had failed were entitled to recover their money from the bank at its head office in Montreal, that this was a civil right existing and enforceable outside the province, and that the province could not validly legislate in derogation of that right.

ROYAL BANK OF CANADA *v.* THE KING

P. C. 283

**5. — CANADA — BRITISH COLUMBIA —**

*Charter — Railway — Municipal Clauses Act, 1896 (59 Vict. c. 55, British Columbia), s. 64 — Charter bestowing Right, Franchise, or Privilege — Statutory Powers to construct and operate Railway — Agreement with Municipality — Consent of Electors — Validity of By-law — Repugnancy between Statutes of same Year — Later Chapter to prevail.*

The appellant company had powers under the Consolidated Railway Company's Act, 1896, to construct and operate a street railway or tramway in certain districts in British Columbia along such streets or roads as might be specified by the council of any municipality through which the same might be constructed, who might fix the location and terms of user over such streets or roads. By an agreement between the appellant company and the corporation of Point Grey, which was in the districts referred to, the corporation consented to the appellant company constructing a tramway along specified roads and, upon certain conditions, operating the same for forty years. The agreement also provided that if the corporation or other persons should desire thereafter to construct a tramway along other roads the appellant company should have, upon certain conditions, a prior right to construct and operate it. A by-law of the corporation authorized the affixing of the corporate seal to this agreement:—

*Held*, that the agreement and by-law did not amount to a charter bestowing a right, franchise, or privilege within the meaning of the Municipal Clauses Act, 1896, s. 64, and that they were not invalid in the absence of the assent of the electors referred to in that section.

*Held*, further, that if there was a repugnancy between the Consolidated Railway Company's Act, 1896, and the Municipal Clauses Act, 1896, the former, being the later chapter of the Statutes for that year, should prevail. **BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *v.* STEWART** - - - P. C. 816

**6. — CANADA — BRITISH COLUMBIA —**

*Forfeiture, Relief against — Default in Payment of an Instalment of Purchase-money — Time of the Essence of the Contract — Specific Performance decreed.*

An agreement for sale by the respondent company of lands in British Columbia for a price

**PRIVY COUNCIL APPEALS** —*continued.*

to be paid in instalments at specified dates contained a clause of forfeiture both of the agreement and of all payments of past instalments of purchase-money in case of default of punctual payment of any one instalment; and time was declared to be of the essence of the agreement. Default having been made, the company sued to enforce the forfeiture; the appellant paid into Court the instalment due and counterclaimed for specific performance:—

*Held*, that by the law of British Columbia as well as by English law the condition of forfeiture was in the nature of a penalty from which the appellant was entitled to be relieved on payment of the purchase-money due. **KILMER *v.* BRITISH COLUMBIA ORCHARD LANDS, LIMITED** P. C. 319

**7. — CANADA — BRITISH COLUMBIA —**

*Municipal Act, 1892, s. 146 — Municipal Clauses Act, 1897, ss. 243, 244 — Construction — Validity of Municipal By-laws — Validity of Municipal Debentures — Limitation — Law of British Columbia.*

By the British Columbia Municipal Act, 1892, s. 146, a municipal by-law under which debentures have been issued, and the interest thereon paid by the municipality for a year or more, cannot be invalidated or set aside on any ground whatever. And ss. 243 and 244 of the Municipal Clauses Act, 1897, bar any cause of action within one year from the date thereof in respect of deviations by the municipality from the general plan of any public works authorized by its by-laws.

Such deviations are justified when they are incidental to the carrying out of the authorized works and are made with a view to diminish unnecessary inconvenience and resulting claims to compensation. **WILSON *v.* DELTA CORPORATION** - - - - - P. C. 181

**8. — CANADA — MANITOBA — Agreement to give an Option to Purchase and also a Commission on Sale — Construction.**

On March 11, 1911, the appellants agreed to give the respondents an option to purchase on specified terms the properties in suit, and also agreed to pay them a commission on sale and to close the sale by deed and mortgage. The respondents duly exercised this option in favour of S., to whom the deed and mortgage were executed.

In a suit by the appellants to set aside the transaction and recover the property sold on the ground that they had subsequently discovered that S. was a clerk in the office of the respondents, the latter being the real purchasers, but disqualified as being agents for sale:—

*Held*, that the respondents were not merely agents to sell. An option to purchase was given to them in plain and unequivocal terms, and the subsequent clause as to a commission was not inconsistent therewith.

*Livingstone *v.* Ross* [1901] A. C. 327, distinguished. **KELLY *v.* ENDERTON** - P. C. 191

— Canada—North-West Provinces.  
See No. 3, above.



**PRIVY COUNCIL APPEALS—continued.**

9. — **CANADA—ONTARIO—Execution—Fieri Facias—Unpatented Mining Claim in Ontario—Seizure and Sale—Mining Act of Ontario (Stat. of Ontario, 8 Edw. 7, c. 21)—Execution Act (Stat. of Ontario, 9 Edw. 7, c. 47).**

Under a writ of fieri facias against the "goods and chattels, lands and tenements" of a judgment debtor, his undivided interest in a mining claim, in respect of which (under the Mining Act of Ontario, 1908) a certificate of record has been issued but no patent granted, is liable to seizure and sale. **CLARKSON AND FORGIE v. WISHART AND MYERS - P. C. 828**

10. — **CANADA—ONTARIO—Ontario Crown Timber Act (R. S. Ont., 1897, c. 32)—Right of Licensee in Land—Interest of Licensee exigible under Ontario Execution Act, 1909 (9 Edw. 7, c. 47)—Assignee of License after Writ of Fi. Fa. issued—Execution.**

Under a writ of fieri facias against "the goods and chattels, lands and tenements" of a judgment debtor his interest in lands as a licensee thereof under the Crown Timber Act (R. S. Ont., 1897, c. 32), which includes a title thereto subject to the conditions of the license, is liable to seizure and sale under Ontario Execution Act (9 Edw. 7, c. 47).

**Glenwood Lumber Co., Ltd. v. Phillips [1904] A. C. 405, followed.**

Where execution is levied upon timber cut by an assignee of the license under an assignment made subsequently to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable consideration without notice of the execution and. has paid his purchase-money. **MCPHERSON v. TEMISKAMING LUMBER COMPANY, LIMITED - - - P. C. 145**

11. — **CANADA—ONTARIO—Set-off—Suit by Assignees from Receivers of a Company not in Liquidation—Contracts by the Debtors with the Company—Right of Set-off in respect of Damages for Breach.**

The respondents sued as assignees from the receivers appointed in a debenture-holders' action of a company not in liquidation to recover the price of goods supplied by the receivers to the appellants under contracts with the company subsisting at their appointment, but subsequently declared by them to be cancelled. The appellants claimed to set off against the price sued for damages for the breach of the said contracts:—

**Held**, that they were entitled so to do. The amount sued for was due under the old contracts with the company which was responsible for the breach, and not under new contracts with the receivers. In the absence of a liquidation the persona of the contracting company remained legally intact as well as its contracts, though controlled by the receivers, who continued and managed its business as officers of Court and had taken no steps to determine the relations between the company and the appellants. **PARSONS v. SOVEREIGN BANK OF CANADA**

**P. C. 160**

**PRIVY COUNCIL APPEALS—continued.**

12. — **CANADA—QUEBEC—Railway—Canadian Railways—Level Crossings—Duty to sound Whistle—Duty to warn Persons—Shunting Engine—Breach of Statutory Duty—Cause of Damage—The Railway Act (R. S. of Canada, 1906, c. 37), ss. 274, 276.**

The Railway Act (R. S. of Canada, 1906, c. 37), s. 274, provides that "when any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway." The same Act by s. 276 provides that "whenever in any city, town or village any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train . . . which is then foremost a person who shall warn persons standing on or crossing or about to cross the track of such railway":—

**Held**, (1.) that s. 274 does not apply to an engine engaged in shunting and never being in the course of its work more than eighty rods from any level crossing which it crosses;

(2.) that under s. 276 it is necessary only that the warning should be such as ought to be apprehended by a person of ordinary faculties in a reasonably sound, active, and alert condition, and that the time given to avoid the danger should be reasonably sufficient to enable a person of that description to avoid it;

(3.) that in an action for damages for personal injuries a plaintiff relying on the breach of a statutory duty must prove not only the breach, but also that the breach caused the injuries. **GRAND TRUNK RAILWAY COMPANY v. MCALPINE - - - P. C. 838**

13. — **MALAY STATES—Registration of Titles Regulation, 1891 (Reg. IV. of 1891, State of Selangor), s. 7—Fraud—Knowledge of Unregistered Rights—Rectification—Trustee Specific Relief Enactment, 1893 (Enact. IX. of 1903), s. 3, Illustration (g).**

The Registration of Titles Regulation, 1891, provides for the registration of all titles to land in the State of Selangor, and by s. 7 provides that the title of the person named in the certificate of title issued thereunder shall be indefeasible except on the ground of fraud or misrepresentation or of adverse possession for the prescriptive period. In June, 1910, one Eusope was the registered owner of 322 acres of land in Selangor, as to 58 acres of which the appellant was in possession under unregistered Malay documents constituting him the owner subject to the payment of an annual rent to Eusope. The respondents, who had knowledge of the appellant's interest, bought from Eusope the 322 acres excepting the said 58 acres. A transfer of the whole 322 acres was prepared, and in order to induce Eusope to sign it the respondents' agent told him that if he did so the respondents would purchase the appellant's interest, and signed a document which stated "As regards Loke Yew's interest I shall have to make my own arrangements." Eusope thereupon signed the transfer,

**PRIVY COUNCIL APPEALS—continued.**

The respondents, having obtained thereunder registration of the entire 322 acres, called upon the appellant to give up possession of the 58 acres, and upon his failing to do so commenced an action, claiming possession thereof and damages. The appellant asked for rectification:—

*Held*, that the action should be dismissed and the respondents ordered to execute and register in the appellant's name a grant of the 58 acres subject to the rent reserved, on the grounds—

(1.) that, on the facts, the respondents obtained the transfer by fraud and misrepresentation.

(2.) That, apart from the exception in s. 7, as the rights of third parties did not intervene, the respondents could not better their position by obtaining registration under circumstances which made it not honest to do so, and that it was the duty of the Court to order rectification.

(3.) That under the Specific Relief Enactment, 1903, s. 3, the respondents having bought with notice of the appellant's rights were trustees for him in respect thereof. **LOKE YEW v. PORT SWETTENHAM RUBBER COMPANY, LIMITED**

**P. C. 491**

**14. — NEW SOUTH WALES — Civil Service—New South Wales Civil Service Act, 1884, Part V.—Public Service Acts of 1895 and 1902—Public Service (Superannuation) Act, s. 2 (b)—Construction—Rights of Officer in the Civil Service on Superannuation.**

Under the provisions of Part V. of the New South Wales Civil Service Act, 1884, the respondent, an officer in the Civil Service, was entitled at any time after the age of sixty to retire therefrom upon the superannuation allowance provided by the Act and payable out of the fund constituted thereby. Such right is absolute and in the absence of express provisions in the Act cannot be conditioned on his giving notice to the Crown of his retirement, nor suspended during his membership of the Public Service Board under the Public Service Acts of 1895 and 1902 which he had accepted after retirement.

The superannuation fund having been exhausted:—

*Held*, that under s. 2 (b) of the Public Service (Superannuation) Act, 1903, the allowances payable thereout should be paid from the Consolidated Revenue Fund. **WILLIAMS v. DELOHERY** - - - - **P. C. 172**

**15. — NEW SOUTH WALES—Revenue—Stamp Duties—New South Wales Stamp Duties (Amendment) Act, 1904 (Act 24 of 1904), s. 21—Construction—Special Power of Appointment—Aggregation of Estates—Rate at which Duty chargeable—Stamp Duties Act, 1898 (Act 27 of 1898), s. 49, sub-s. 2 (A) (a)—Probate Duties (Amendment) Act, 1899 (Act 45 of 1899), Schedule.**

The effect of the New South Wales Stamp Duties (Amendment) Act, 1904, s. 21, is not to provide for any aggregation of estates for the purpose of determining the rate at which duty is chargeable under the Stamp Duties Act, 1898, s. 49, as amended by the Probate Duties (Amend-

**PRIVY COUNCIL APPEALS—continued.**

ment) Act, 1899; the estate of the person dying is for the purpose of duty a separate estate, and similarly each estate chargeable under the Stamp Duties Act, 1898, s. 49, sub-s. 2, is for that purpose a separate estate. **BRUNTON v. NEW SOUTH WALES COMMISSIONER OF STAMP DUTIES** - - - - **P. C. 747**

**16. — NEW ZEALAND — Land — Native Titles to Land—New Zealand Settlement Act, 1863 (27 Vict. No. 8)—Order in Council.**

By the New Zealand Settlement Act, 1863, s. 3, the Governor in Council was empowered to "set apart" within any district, declared under s. 2 to be a district within that Act, "eligible sites for settlements for colonization." Sect. 4 provided: "for the purposes of such settlements the Governor in Council may from time to time reserve or take any land within such district and such land shall be deemed to be Crown land, freed and discharged from all title, interest or claim of any person whomsoever." By an Order in Council dated September 2, 1865, made under the above Act, it was declared that certain lands should be a district within the above Act and that the said lands were required for the purposes of the Act, and were subject to the provisions thereof; and it ordered that such lands should be "set apart and reserved as sites for settlements for colonization agreeably to the provisions of the Act." The Order further declared, "no land of any loyal inhabitant within the district, whether held by native custom or Crown grant, will be taken, except so much as may be absolutely necessary for the security of the country, compensation being given for all lands so taken":—

*Held*, that the above Order in Council did not extinguish the native or other title of any loyal inhabitant of the district.

*Te Teira Te Paea v. Te Roera Tareha* [1902] A. C. 56, distinguished. **MANU KAPUA v. PARA HAIMONA** - - - - **P. C. 761**

**17. — NEW ZEALAND—Revenue—Income Tax Assessment—Profits derived from cutting and selling Timber—Value of Timber cut—Right to make Deduction—Land and Income Assessment Act, 1908 (No. 95 of the Consolidated Statutes of New Zealand), ss. 71, 79, and 87.**

A company carried on in New Zealand the business of cutting, milling, and selling timber, and for the purpose of that business it acquired, upon its incorporation and from time to time subsequently, rights over freehold and leasehold bush lands bearing natural timber, in some cases by purchasing the lands and in other cases by purchasing the timber thereon with the right to remove the timber within a stated period:—

*Held* that, under the Land and Income Assessment Act, 1908, which regulates the assessment of income tax in New Zealand, the company was not entitled in its assessment for income tax to make any deduction from the gross proceeds of its business in respect of the value of the standing timber which it had cut. **KAURI TIMBER COMPANY, LIMITED v. COMMISSIONER OF TAXES** - - - - **P. C. 771**

— **ONTARIO—Laws of.**

*See* Nos. 9—11, above.

**PRIVY COUNCIL APPEALS** *continued.*

**18. — OTTOMAN DOMINIONS** — *Insurance (Fire)—Condition in Policy—Declaration of other Insurances—Substitution of Insurances for those declared.*

Under two policies in French the respondent insured against fire a building and its contents, each for 600*l.* The policies provided by Condition III. that if the property should be insured under other contracts, subscribed either before or after the policies attached, he was "tenu de le déclarer, par écrit, et de le faire mentionner soit dans la police même, soit par un endos inscrit par la compagnie sur la dite police." The respondent had at the time of effecting the policies concurrent insurances with other companies for 600*l.* upon the building and 600*l.* upon the contents, and these insurances were recorded in the policies respectively. Subsequently the concurrent insurances were replaced by other insurances to a slightly larger amount, the excess being due to new decoration of the building and additions to the contents. These substituted insurances were not communicated to the appellants or indorsed on the policies:—

*Held*, that Condition III. in the policies meant only that the fact that the property covered was further insured should be declared, and that the respondent had committed no breach of the condition and was entitled to recover upon the policies. **NATIONAL PROTECTOR FIRE INSURANCE COMPANY, LIMITED v. NIVERT** - - - - - **P. C. 507**

— **QUEBEC**—Laws of.

*See* No. 12, above.

— **SINGAPORE, SETTLEMENT OF**—Laws of.  
*See* next case.

**19. — STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE)** — *Banker — Crossed Cheque — Payment — Exchange of Cheques — Ostensible Authority — Estoppel — Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 79.*

The appellants' cashier presented at the respondents' bank cheques drawn on the respondents in favour of the appellants and crossed generally; in exchange he was handed cheques for the same amounts drawn by the respondents upon other banks and crossed generally. The appellants had by their conduct held out their cashier as having authority to deal with the cheques in this way. The cashier fraudulently paid the cheques handed him by the respondents to his own banking account and misappropriated the proceeds:—

*Held*, that the cheques drawn on the respondents were paid by the cheques given in exchange within the meaning of the Bills of Exchange Act, 1882, s. 79, sub-s. 2, but that the appellants were estopped from denying the authority of their cashier to receive payment in that manner and were not entitled to recover damages. **MEYER & CO., LIMITED v. SZE HAI TONG BANKING AND INSURANCE COMPANY, LIMITED** - - - - - **P. C. 847**

**PROSPECTUS** — Company — Contract to take shares—Rescission—Fraudulent misrepresentation—Quotation in prospectus of report by one of the directors - **853**  
*See* COMPANY.

**PUBLICATION**—Divorce—Nullity—Hearing in camera — Publication of proceedings after decree—Contempt of Court **417**  
*See* DIVORCE.

**PUBLIC HEALTH**—Rates.

*See* under RATES.

**PURCHASER**—Vendor and.

*See* VENDOR AND PURCHASER.

**QUEBEC**—Laws of—Canada.

*See* PRIVY COUNCIL APPEALS. 12.

**RAILWAY** — *Minerals—Support—Mines lying outside the Forty Yards Limit—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85.*

As between vendor and vendee the mining sections (ss. 77 to 85) of the Railways Clauses Consolidation Act, 1845, so far as support is concerned, do not apply to mines outside the forty yards or other the prescribed limit mentioned in s. 78; consequently, as between a vendor of land to a railway company and the railway company, upon a purchase subject to those sections, the railway company enjoys a natural right of support for its railway from minerals belonging to the vendor lying under other lands outside the statutory limit.

*Great Western Ry. Co. v. Bennett* (1867) L. R. 2 H. L. 27, discussed.

Decision of the Court of Appeal [1911] 2 Ch. 97, affirmed. **HOWLEY PARK COAL AND CANNEL COMPANY v. LONDON AND NORTH WESTERN RAILWAY COMPANY** **H. L. (E.) 11**

**2. — Railway and Canal Commission—Appeal — Competency — Reference relating to Telephones — Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 17, sub-ss. 1, 2, and 5 — Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), ss. 1 and 2.**

An appeal lies to the House of Lords from a decision of the Court of Appeal upon the question whether they have jurisdiction to entertain an appeal from the Railway and Canal Commission under s. 17 of the Railway and Canal Traffic Act, 1888.

By the Railway and Canal Traffic Act, 1888, the Railway and Canal Commission, which as regards England consisted of one ex officio and two appointed Commissioners, was established as a Court of record, and an appeal lay from the Commission to the Court of Appeal except upon questions of fact and locus standi.

By an agreement under seal made in 1905 a telephone company agreed to sell to the Postmaster-General all the plant in use by the company on December 31, 1911, and any dispute as to the value of the plant was to be referred to the Railway and Canal Commission if they should be authorized to determine it. The Telegraph (Arbitration) Act, 1909, enacted (s. 1) that any difference between the Postmaster-General and any body or person under any agreement relating to telephones should, if the parties agreed, be referred to the Railway and



**RAILWAY—continued.**

Canal Commission, who were bound to determine it; and (s. 2) that all proceedings relating thereto should be conducted by the Commission in the same manner as any other proceeding was conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, and that any order of the Commission on any such difference should be enforceable as any other order of the Commission, provided (inter alia) that any such matter of difference might, in certain events, be heard and determined by the two appointed Commissioners. A difference having arisen as to the value of the plant, the Commission, at the request of the parties, fixed and determined the value:—

*Held*, that the reference to the Commission under the Telegraph (Arbitration) Act, 1909, was a reference to them as a Court of record and not as arbitrators, and that an appeal lay on a point of law to the Court of Appeal.

Decision of the Court of Appeal [1913] 2 K. B. 614, affirmed.

NATIONAL TELEPHONE COMPANY, LIMITED  
v. HIS MAJESTY'S POSTMASTER-GENERAL

H. L. (E.) 547

— Charter—Statutory powers to construct and operate railway—Agreement with municipality—Laws of British Columbia  
*See* PRIVY COUNCIL APPEALS. 5. 816

— Level crossing—Duty to sound whistle—Duty to warn persons—Shunting engine—Breach of statutory duty—Cause of damage—Canadian railways - 838  
*See* PRIVY COUNCIL APPEALS. 12.

— Rates — Tramway — Assessment — "Land used only as a railway" - - 702  
*See* RATES. 1.

**RATES—General District Rate—Assessment—Tramways—"Land used only as a railway"—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b).**

A company were the occupiers of, and worked as one connected system, a tramway and a light railway, which were constructed in and along certain public streets and roads in the district of an urban council. The tramway was constructed under various local tramway Acts and Orders, and the light railway under Orders made under the Light Railways Act, 1896. The tramway and the light railway had a junction with each other and were worked by electricity on the overhead system. They were identical as to mode of construction and materials used, and the rails of each were laid level with the surface of the highway; the same carriages were used upon them and ran through the one on to the other, and the electrical energy used for working both the tramway and the light railway was generated at the same power station and thence transmitted over a common system of cables and mains to sub-stations:—

*Held*, that the tramway was not a railway within the meaning of s. 211, sub-s. 1 (b), of the Public Health Act, 1875, and that the company were therefore not entitled in respect of their

**RATES—continued.**

tramway to be assessed to the general district rate at one fourth only of its net annual value.

*Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357, followed.

Decision of the Court of Appeal [1912] 2 K. B. 216, reversed. TOTTENHAM URBAN DISTRICT COUNCIL v. METROPOLITAN ELECTRIC TRAMWAYS, LIMITED - H. L. (E.) 702

2. — *Poor Rate—Rateable Occupation—Owner in Possession of Land used as a Gathering Ground for Waterworks.*

A municipal corporation owned certain reservoirs and waterworks and received into their reservoirs the water which flowed from an adjoining gathering ground. In order to prevent pollution of the water flowing from it to their works the corporation purchased the gathering ground, which consisted of agricultural land and moorland. They thereupon demolished certain farmhouses on the land, abolished certain rights of pasturage and turf cutting thereon, and limited the user of the land to purposes of sporting and afforestation. They planted a portion of the land with trees, converted another portion into nurseries, and let the sporting rights over the land to a lessee for a term of years, but they did not exercise any other acts of occupation over the land:—

*Held*, that the corporation were in rateable occupation of the whole of the land as a gathering ground.

Dictum of Lord Mansfield in *Rees v. St. Luke's Hospital* (1760) 2 Burr. 1053, at p. 1064, considered.

Order of the Court of Appeal [1912] 1 K. B. 270, affirmed. LIVERPOOL CORPORATION v. CHORLEY UNION ASSESSMENT COMMITTEE AND WITHNELL OVERSEERS - H. L. (E.) 197

— Water rate.

*See* under WATER.

**RE-CERTIFICATION—Workmen's compensation—Contracting out—Scheme of compensation—Ballot—Jurisdiction of county court judge - - - 638**  
*See* EMPLOYER AND WORKMAN. 2.

"REDEEMABLE"—Loan—Burgh—Issue of redeemable stock by municipal corporation - - - 133  
*See* SCOTTISH LAW. 4.

**REDEMPTION—Land tax—Exoneration—Land abutting on highway—Presumption that soil of highway passes ad medium filium - - - 364**  
*See* LAND TAX.

**REFERENCE—Arbitration.**  
*See* ARBITRATION.

**REGISTRATION—Trade mark.**  
*See* under TRADE MARK.

**REPAIRS—Cost of—Waterworks—Breaking up streets—Jurisdiction of justices - 597**  
*See* WATER. 1.



**REPAIRS**—*continued.*

— London building — Party structure — Defective party wall — Making good or repairing - - - - - 584  
*See LONDON.*

**REPRESENTATION**—Sale of shares—Warranty—Breach—Warranty or representation—Test of warranty - - - - - 30  
*See VENDOR AND PURCHASER.*

**REPUTED OWNERSHIP**—Bill of sale—Bankruptcy of grantor before default in payment—Irish Bankrupt and Insolvent Act, 1857, s. 313 - - - - - 564  
*See BANKRUPTCY.*

**RESTRAINT OF TRADE**—*Agreement by Employee not to be engaged in Business the same as or similar to that of Employer—Reasonableness of Restriction—Vagueness—Injunction.*

By a contract for the employment of the defendant as canvasser by the plaintiffs, a clothing and supply company having branches all over England, described in the contract as carrying on business on the check and credit system "at London in the county of Middlesex (amongst other places)," the defendant agreed that he would not within three years after the termination of the employment be in the employ of any person, firm, or company carrying on or engaged in a business the same as or similar to that of the plaintiff company, or assist any person employed or assisting in any such business, "within twenty-five miles of London aforesaid where the company carry on business" :—

*Held*, assuming, without deciding, that the agreement was not too vague as regards the area of restriction to be enforced by injunction, that the restriction was wider than was reasonably necessary for the plaintiffs' protection.

Decision of the Court of Appeal [1913] 1 K. B. 65, reversed. *MASON v. PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED*

**H. L. (E.) 724**

— Contract or combination in restraint of trade—Monopoly—Australian Industries Preservation Act, 1906, ss. 4, 7, 10, 15A - - - - - 781  
*See PRIVY COUNCIL APPEALS. 2.*

**REVENUE**—*Duties on Land Values—Valuation—"Assessable site value"—Minus Value—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 25, sub-s. 4.*

In making the valuation required by the Finance (1909-10) Act, 1910, to be made for the purposes of the land taxes imposed by that Act, "the assessable site value of land," ascertained in the manner provided by s. 25, sub-s. 4, of the Act, may be shewn as a minus quantity.

Decision of the Lords of the Court of Session in Scotland named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Act (1912 S. C. 948) reversed. *INLAND REVENUE COMMISSIONERS v. HERBERT* - **H. L. (Sc.) 326**

**2. — Income Tax—Insurance Company—Foreign Investments—Interest not remitted Home—Income Tax Act, 1842 (5 & 6 Vict. c. 35),**

**REVENUE**—*continued.*

s. 100, *Sched. D, First, Fourth, and Fifth Cases—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D.*

A fire and life insurance company, which, in addition to its business done at home, carried on a fire insurance business abroad, was registered in this country under the Companies Acts and had its head office here. One of the objects stated in its memorandum of association was to invest money not immediately required in such manner as might from time to time be determined. By the laws of certain of the foreign States in which it carried on business an insurance company was required, as a condition precedent to carrying on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements the company invested certain sums in those States. It also voluntarily invested there other sums representing accumulated profits of the business. Both classes of investments yielded interest which was received by the company abroad but was not remitted to the United Kingdom. This interest was included in the balance-sheets of the company :—

*Held*, that the income of the foreign investments formed part of the profits or gains of the company's business and was properly taxed under case 1 of Sched. D of s. 100 of the Income Tax Act, 1842.

Decision of the Court of Appeal [1912] 2 K. B. 41, affirmed.

*LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY v. BENNETT* **H. L. (E.) 610**

**3. — Licensed Premises—Annual Licence Value—Basis of Calculation—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 44, sub-s. 2.**

By s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, for the purposes of the sub-section the annual licence value of licensed premises shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises, and, "in estimating for that purpose the value as licensed premises of hotels or other premises used for purposes other than the sale of intoxicating liquor, no increased value arising from profits not derived from the sale of intoxicating liquor shall be taken into consideration" :—

*Held*, (1.) that the ejusdem generis rule or construction did not apply to the words "hotels or other premises used for purposes other than the sale of intoxicating liquor," and, consequently, that a public-house which derived part of its profits from the sale of non-intoxicants fell within this provision; (2.) that the words "increased value" meant only the extra value arising from the profits of the trade in non-intoxicants due to the fact that the trade was carried on on licensed premises, and not the total value arising from the profits of that trade.

Decision of the Court of Appeal [1912] 3 K. B. 377, affirmed on the first point and reversed on the second point. *INLAND REVENUE COMMISSIONERS v. TRUMAN, HANBURY, BUXTON & CO., LIMITED* - - - - - **H. L. (E.) 650**

**REVENUE—continued.**

— Income tax—Assessment—New Zealand Land and Income Assessment Act, 1908, ss. 71, 79, 87 - - - - 771  
See PRIVY COUNCIL APPEALS. 17.

— Stamp duties—New South Wales Stamp Duties (Amendment) Act, 1904, s. 21  
See PRIVY COUNCIL APPEALS. 15. 747

**SALE**—Agreement to give an option to purchase and also a commission on sale—Construction—Appeal from Manitoba 191  
See PRIVY COUNCIL APPEALS. 8.

— Vendor and purchaser.  
See under VENDOR AND PURCHASER.

**SCHOOL**—Non-provided School—Duty to maintain and keep efficient—Powers of Management—Appointment and Payment of Caretaker—Education Act, 1902 (2 Edw. 7, c. 42), s. 7.

The managers of a non-provided public elementary school, in exercise of the powers of management conferred upon them by s. 7, sub-s. 7, of the Education Act, 1902, are entitled to appoint a caretaker and cleaner of the school, and to have their salaries paid by the local education authority.

Order of the Court of Appeal [1911] 2 K. B. 1074, reversed, and judgment of Hamilton J. [1911] 1 K. B. 222, restored. GILLOW v DURHAM COUNTY COUNCIL - H. L. (E.) 54

**SCOTTISH LAW**—Agent and Client—Negligence—Breach of Duty.

Interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland, 1911 S. C. 1248, affirmed on the evidence. LEARROYD OR DICK v. ALSTON

H. L. (Sc.) 529

2. — Building Contract—Construction—Liquidated Damages.

Interlocutor of the First Division of the Court of Session in Scotland, 1912 S. C. 591, affirmed. BRITISH GLANZSTOFF MANUFACTURING COMPANY, LIMITED v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED - - - H. L. (Sc.) 143

3. — Burgh — Drainage and Road Authority — Flooding — Natural Stream — Reparation—Negligence—Edinburgh Corporation Act, 1909 (63 & 64 Vict. c. cxxviii.), s. 28.

Interlocutor of the Second Division of the Court of Session in Scotland (1912 S. C. 1199) reversed, and interlocutor of the Lord Ordinary restored, on the facts. HANLEY v. EDINBURGH CORPORATION - - - H. L. (Sc.) 488

4. — Loan—Local Government—Burgh—Issue of Redeemable Stock by Municipal Corporation—"Redeemable"—Edinburgh Corporation Stock Act, 1894 (57 & 58 Vict. c. lvi.), s. 5—Edinburgh Improvement and Tramways Act, 1896 (59 & 60 Vict. c. cxxiv.), s. 83.

By the Edinburgh Corporation Stock Act, 1894, the Corporation of Edinburgh, where they had any unexhausted statutory borrowing power, were authorized to exercise such power

**SCOTTISH LAW—continued.**

by the creation of redeemable stock, and by the Edinburgh Improvement and Tramways Act, 1896, the corporation, in addition to the powers contained in the Act of 1894, were authorized to create and issue a new class of stock to be "redeemable at the option of the corporation at one and the same period to be fixed by the corporation but not exceeding sixty years from the first issue of such stock." In pursuance of this power the corporation issued stock to be redeemable at par after the expiration of a period of thirty years from May 15, 1897:—

*Held*, that the corporation were not bound, on the application of the holders, to redeem the stock immediately on the expiration of that period, but had merely an option to do so.

Decision of the Extra Division of the Court of Session in Scotland, 1912 S. C. 139, reversed. EDINBURGH CORPORATION v. BRITISH LINEN BANK - - - - - H. L. (Sc.) 133

5. — Trust—Liability of Trustees—Breach of Trust—Action by assumed Trustees to recover Loss to Trust Estate caused by Negligence of Original Trustee—Mora—Contributory Negligence—Right of Pursuers to represent Beneficiaries—Interest—Rate of Interest.

A testator, who died in 1858, by his trust disposition and settlement gave to his son, on his attaining the age of twenty-five, an option to purchase his dwelling-house. In 1870 the son, who acted as agent in the trust, being about to attain the age of twenty-five, announced to the trustees his intention to exercise this option, and the trustees signed and delivered to him a disposition of the house in his favour, which was duly recorded. The trustees took no steps either in 1870 or for seventeen years afterwards to obtain payment of the purchase-money, and the money never was paid. In 1887, the testator's widow being then the sole surviving trustee, the pursuers were assumed as trustees, and they endeavoured to make the son account for the trust estate, but subsequently ceased their efforts owing to the refusal of the widow to allow her son to be sued. In 1902, on the death of the widow, the assumed trustees brought an action of accounting against the son, but the action proved abortive by reason of his bankruptcy and death. Between 1887 and 1902 the son was in a position to make good the purchase-money. In 1909 the assumed trustees brought an action against the beneficiaries of a deceased trustee to recover the purchase-money alleged to have been lost to the trust estate through his negligence as trustee. The defenders pleaded mora as a bar to the action:—

*Held*, that the plea of mora was not sustainable against the pursuers suing as trustees on behalf of the beneficiaries, and that the defenders were jointly and severally liable, to the extent to which they were respectively lucrati from the estate of the deceased trustee, for the price of the house with interest thereon at the rate of 3½ per cent. per annum from the death of the widow.

Decision of the Second Division of the Court of Session in Scotland, 1912 S. C. 50, affirmed. SCHULZE v. TOD - - - - - H. L. (Sc.) 213

**SCOTTISH LAW—continued.**

— Company—Contract to take shares—  
 — Rescission—Fraudulent misrepresentation—Quotation in prospectus of report by one of the directors - 553  
*See COMPANY.*

— Employer and workman—Workmen's compensation—Arbitration—Competency—Question arising as to duration of compensation - - - 221  
*See EMPLOYER AND WORKMAN. 1.*

— Employer and workman—Workmen's compensation—Dependants—Desertion by father—Decree for alimony - 531  
*See EMPLOYER AND WORKMAN. 3.*

— Fraud—Contract induced by fraudulent misrepresentation - - - 404  
*See FRAUD.*

— Libel—Innuendo—Newspaper—Trade publication—List of decrees in absence—Erroneous entry—Imputation of insolvency - - - 386  
*See DEFAMATION.*

— Revenue—Duties on land values—Valuation—"Assessable site value"—Minus value - - - 326  
*See REVENUE. 1.*

— Ship—Affreightment—Bill of lading—Exceptions—Liability for unmarked goods—Commixtio - - - 680  
*See SHIPPING. 1.*

**SELANGOR**—Malay States—Laws of. - 491  
*See PRIVY COUNCIL APPEALS. 13.*

**SERVANT**—Master and.  
*See under EMPLOYER AND WORKMAN.*

**SET-OFF**—Suit by assignees from receivers of a company not in liquidation—Contracts by the debtors with the company—Right of set-off in respect of damages for breach—Appeal from Ontario - 160  
*See PRIVY COUNCIL APPEALS. 11.*

**SHARES**—Company.  
*See under COMPANY.*

**SHIPPING**—Affreightment—Bill of Lading—Exceptions—Condition exempting Ship from Responsibility for Obliteration or Absence of Marks—Liability for Unmarked Goods—Commixtio.

Bales of jute consigned to various consignees and specifically marked were shipped under bills of lading stating that the bales were received "marked and numbered as per margin," that the number of packages signed for was to be binding on the shipowner unless error or fraud be proved, but that the ship was not to be liable for "obliteration or absence of marks." On the discharge of the ship fourteen bales were missing and eleven bales, forming part of the cargo shipped at the port of loading, were not marked as labelled in the bills of lading and could not be identified as belonging to any particular consignment. All the consignees received their full

**SHIPPING—continued.**

consignments except four, who refused to accept any of the eleven bales. In an action for freight by the shipowner against one of the four consignees, who had received six bales less than his full consignment, the consignee counterclaimed for shortage. The shipowner was willing to account to the four consignees for the value of the fourteen missing bales in proportion to their respective shortages, but claimed that the eleven bales ought to be allocated amongst them in the like proportion:—

*Held*, that, as the shipowner had failed to deliver the full number of bales shipped, he was not entitled to claim that the non-delivery of any of the six bales was due to obliteration or absence of marks, and that he was liable for the full value of the six bales.

*Spence v. Union Marine Insurance Co. (1868)*  
 L. R. 3 C. P. 427, distinguished.

Dictum of Lord Russell of Killowen in *Smurthwaite v. Hannay* [1894] A. C. 494, at p. 505, considered.

Decision of the Second Division of the Court of Session in Scotland, *Tyzack and Branfoot Steamship Co., Ltd. v. Sandeman & Sons*, 1913 S. C. 19, reversed. **SANDEMAN & SONS v. TYZACK AND BRANFOOT STEAMSHIP COMPANY, LIMITED**

**H. L. (Sc.) 680**

**2. — Fire—Damage to Cargo—Unseaworthiness—Bill of Lading—Exceptions—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502.**

Appeal and cross-appeal from an order of the Court of Appeal affirming an order of Bray J. [1912] 1 K. B. 229, withdrawn on the terms agreed upon between the parties. **NORFOLK AND NORTH AMERICAN STEAM SHIPPING COMPANY, LIMITED v. VIRGINIA CAROLINA CHEMICAL COMPANY - - - H. L. (E.) 52**

**SOLICITOR**—Agent and client—Negligence—Breach of duty—Solicitor and bank agent - - - 529  
*See SCOTTISH LAW. 1.*

**SPECIFIC PERFORMANCE**—Forfeiture, Relief against—Default in payment of an instalment of purchase-money—Time of the essence of the contract—Appeal from British Columbia - - 319  
*See PRIVY COUNCIL APPEALS. 6.*

**STATUTE**—Repugnancy between statutes of same year—Later chapter to prevail—Appeal from British Columbia - 816  
*See PRIVY COUNCIL APPEALS. 5.*

**STATUTES:—****I. IMPERIAL STATUTES.**

1782.

22 Geo. 3, c. 45—*House of Commons (Disqualification)* - - - 514  
*See PARLIAMENT.*

1797.

38 Geo. 3, c. 5, ss. 4, 17, 18, 80—*Land Tax*  
*See LAND TAX. 364*



## STATUTES—continued.

1801.  
41 Geo. 3, c. 52 - - - - 514  
See PARLIAMENT.
1802.  
42 Geo. 3, c. 116, ss. 8, 38—*Land Tax Redemption* - - - - 364  
See LAND TAX.
1842.  
5 & 6 Vict. c. 35, s. 100, Sched. D, First, Fourth, and Fifth Cases—*Income Tax*  
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**TELEPHONE**—Railway and Canal Commission  
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**TRADE MARK**—Registration—Distinctive Mark—Initial Letters—User—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 3; s. 9, sub-s. 5.

Motor cab proprietors in London applied for registration as trade marks for motor vehicles of two marks used by them for about three years on and in connection with their motor cabs in London. One mark consisted of the letters "W" and "G" (joined by the copulative symbol "&") written in a running hand with a distorted tail to the "G" ending up under the "W." The other mark consisted of "W. & G" in ordinary block letters. These marks had become in fact distinctive in the London district but not elsewhere. The registrar refused the applications :—

*Held*, that the marks were not distinctive within the meaning of the word in s. 9, sub-s. 5, of the Trade Marks Act, 1905, and were therefore not registrable.

Decision of the Court of Appeal [1912] 1 Ch. 644, varied. REGISTRAR OF TRADE MARKS *v.* W. & G. DU CROS, LIMITED - H. L. (E.) 624

**TRADE PUBLICATION**—Libel—Innuendo—Newspaper—List of decrees in absence—Erroneous entry—Imputation of insolvency - - - 386  
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**TRADE, RESTRAINT OF.**  
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**TRADE UNION**—Action of Tort—Competency—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4, sub-s. 1.

Section 4, sub-s. 1, of the Trade Disputes Act, 1906, which provides that "an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court," is general in its application and is not limited to tortious acts committed in contemplation or furtherance of a trade dispute; and any such action will be summarily dismissed upon an application under Order XXV., r. 4.

Decision of the Court of Appeal [1912] 3

**TRADE UNION**—continued.

K. B. 547, affirmed. VACHER & SONS, LIMITED *v.* LONDON SOCIETY OF COMPOSITORS  
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**ULTRA VIRES**—Powers of Provincial Legislature—Alberta Act 1 Geo. 5, c. 9, held ultra vires—Civil rights existing and enforceable outside the province - 283  
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— Revenue—Duties on land values—"Assessable site value"—Minus value - 326  
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— Forfeiture, Relief against—Default in payment of an instalment of purchase-money—Time of the essence of the contract—Specific performance decreed  
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**VENDOR AND PURCHASER**—Sale of Shares—Warranty—Breach—Warranty or Representation—Test of Warranty.

The plaintiff asked the local manager of a firm of rubber merchants, who had underwritten a large number of shares in a rubber and produce company then in the course of formation, whether his firm were bringing out a rubber company. He replied that they were. The plaintiff then asked him whether the company was all right. The manager replied that his firm were bringing it out, to which the plaintiff rejoined that that was good enough for him. In answer to further inquiries the manager told the plaintiff that he could let him have 5000 shares at a certain premium. The plaintiff agreed to take the shares, which were subsequently allotted to him. The shares having fallen in value, the

**VENDOR AND PURCHASER**—*continued.*

plaintiff brought an action against the firm for fraudulent misrepresentation and for breach of warranty, the alleged warranty being that the company was a rubber company. The jury negated fraudulent misrepresentation but found that the company could not be properly described as a rubber company and that the manager had given a warranty as alleged:—

*Held*, that there was no evidence proper to be submitted to the jury upon the question of warranty.

Decision of the Court of Appeal reversed.

*Per* Lord Moulton (with the concurrence of Viscount Haldane L.C.): The question whether an affirmation made by the vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question.

The dicta of Bayley J. in *Cave v. Coleman* (1828) 3 Man. & Ry. 2, and of A. L. Smith M.R., delivering the judgment of the Court of Appeal, in *De Lassalle v. Guildford* [1901] 2 K. B. 215, at p. 221, cannot be supported. **HEILBUT, SYMONS & Co. v. BUCKLETON - H. L. (E.) 30**

**WARRANTY**—Sale of shares—Warranty—Breach—Warranty or representation—Test of warranty - - - - - **30**  
See **VENDOR AND PURCHASER**.

**WATER**—*Waterworks—Breaking up Streets—Laying Water Pipes therein—Subsequent Subsidence of Street—Cost of Repair—Compensation—Claim exceeding 50*l.*—Jurisdiction of Justices—Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), ss. 6, 28, 85.

By s. 6 of the Waterworks Clauses Act, 1847, where the undertakers are by the special Act empowered to take or use any lands or streams otherwise than by consent, they shall make to the owners and occupiers of and all other parties interested in any lands or streams injuriously affected by the construction or maintenance of the works authorized by the special Act, or otherwise by the execution of the powers thereby conferred, full compensation for all damage sustained by reason of the exercise as to such lands or streams of the powers vested in the undertakers by that Act or the special Act or any Act incorporated therewith, the amount of compensation being determined under the provisions of the Lands Clauses Consolidation Act, 1845, which provided (s. 22) that claims for compensation not exceeding 50*l.* should be settled by justices and (s. 68) that claims exceeding that amount should be settled by arbitration or by a jury.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." By

**WATER**—*continued.*

s. 85, with respect to the recovery of damages not specifically provided for, the clauses of the Railways Clauses Consolidation Act, 1845, relating thereto were incorporated with that and the special Act; and by s. 140 of the Railways Clauses Consolidation Act, 1845, such damages were to be determined by two justices.

Undertakers for the supply of water to a borough under a special Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under their statutory powers, broke up the soil of a public road, which was repairable by a county council, and laid a pipe therein, and they restored the road to its former condition. Eight months after the completion of the work a portion of the road slipped and was repaired at a cost exceeding 50*l.* Upon a claim preferred by the county council before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage the justices found (1.) that the whole of the work of laying the pipe had been done in a proper, efficient, and workmanlike manner; (2.) that the damage was the result of laying the pipe in the road:—

*Held*, that the claim for compensation fell within s. 6 of the Waterworks Clauses Act, 1847, and that, as it exceeded 50*l.*, the justices had no jurisdiction to entertain it; by Earl Loreburn and Lord Parker of Waddington, because s. 6 applied, whether the claim fell within s. 28 or not; by Lord Shaw of Dunfermline, because the findings of the justices did not bring the claim within s. 28.

Order of the Court of Appeal [1912] 3 K. B. 493, affirmed. **HARPUR v. SWANSEA CORPORATION - H. L. (E.) 597**

2. — *Water Rate—Quantum—Rateable Value—Valuation List in force at Commencement of Quarter—Supplemental Valuation List—Provisional Valuation List—Metropolitan Water Board (Charges) Act, 1907* (7 Edw. 7, c. clxxi.), ss. 8, 13—*Valuation (Metropolis) Act, 1869* (32 & 33 Vict. c. 67), ss. 43—47.

The defendant was the occupier of licensed premises in the city of London, which were supplied with water by the plaintiffs under the Metropolitan Water Board (Charges) Act, 1907. By s. 8 of that Act payment for water so supplied was to be at a rate per annum not exceeding 5 per cent. of the "rateable value" of the house in respect of which the supply was required, and by s. 13 the rateable value "for the purposes of this Act" was to be determined "by the valuation list in force at the commencement of the quarter" for which the water rate accrued. The water rate was payable in advance by four quarterly payments on April 1, July 1, October 1, and January 1 in each year.

In 1908 the quinquennial valuation list for the parish of the city of London was altered by the making of a supplemental valuation list which came into force on April 6, 1909. By this supplemental list the rateable value of these licensed premises was shewn at 400*l.*

On June 2, 1910, the overseers of the parish sent to the assessment committee pursuant to



**WATER**—*continued*.

s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list in which the licensed premises were included at the reduced rateable value of 399*l.*, and on June 23, 1910, the clerk of the committee served on the defendant as occupier a copy of so much of the provisional list as related to these premises, with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value of the premises to 234*l.* On October 1, 1910, the water rate for the quarter commencing on that date became due from the defendant to the plaintiffs. The action was brought to determine the question whether for the purposes of this water rate the valuation list in force on October 1, 1910, was the supplemental valuation list or whether, upon the construction of sub-ss. 3 and 8 of s. 47 of the Valuation (Metropolis) Act, 1869, the provisional list related back to June 23, 1910, and came into force as from that date:—

*Held*, that the valuation list in force on October 1, 1910, was the supplemental list unaltered by the provisional list, and that the defendant was liable to pay the rate payable on that date on the rateable value of 400*l.*

Decision of the Court of Appeal [1912] 2 Ch.

**WATER**—*continued*

546, reversed, and decision of Parker J. [1912] 1 Ch. 296, restored. METROPOLITAN WATER BOARD v. PHILLIPS - - - H. L. (E.) 86

— Poor rate — Rateable occupation —  
Owner in possession of land used as a  
gathering ground for waterworks 197  
*See* RATES. 2.

**WATERWORKS.**

*See* under WATER.

**WILL**—Pledge by one of two executors and  
trustees—Validity—Lapse of time—  
Assent to trusts of will - - - 76  
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**WORKMAN**—Employer and.

*See* under EMPLOYER AND WORKMAN.

**WORKMEN'S COMPENSATION.**

*See* under EMPLOYER AND WORKMAN.









